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LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974

By Anthony Partridge

Federal Judicial Center
August, 1980

This work was produced by the Federal Judicial Center to provide assistance to federal judges in fulfilling their responsibilities under the Speedy Trial Act of 1974. The analysis of the legislative history and the judgments entailed in selecting and arranging original source materials are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be noted, however, that on matters of policy the Center speaks only through its Board.

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FOREWORD

The Speedy Trial Act of 1974 includes a legislative mandate to the Federal Judicial Center to "advise and consult with the planning groups and the district courts in connection with their duties under" the act (18 U.S.C. § 3169). Mr. Partridge, the author of this document, has borne the major share of work in meeting the Center's obligations to advise and consult with the courts on the Speedy Trial Act. Here he has gathered the relevant materials from the legislative history and arranged those materials according to the specific provisions of the 1974 act. Publication of this legislative history has been postponed by passage in 1979 of amendments to the act and the consequent need to consider those amendments, and related legislative reports, in the interests of complete analysis.

The significant management and reporting requirements the act imposes on the federal courts have affected in pervasive ways their processing of criminal cases and—given the act's temporal directives on criminal case processing—of civil cases as well. This legislative history is but one example of the Center's efforts to assist the courts in meeting the act's requirements. The Center's continuing education programs have advised judges and supporting personnel of their responsibilities under the legislation. Through the Courtran program, the Center has developed an automated criminal case docketing and management system for large courts, a central objective being to allow the courts to meet the requirements of the Speedy Trial Act. A less extensive system, the Speedy Trial Act Accounting and Reporting System (STARS) has been developed for courts that either do not need or cannot be provided the full system.

The major Center responsibility, however, of statutorily mandated advice and consultation to help the courts implement the Speedy Trial Act has been assigned to the Research Division. The Division has worked closely with the Criminal Law Committee of the Judicial Conference, and with the Administrative Office, in providing written guidance about the act's requirements. In addition, Mr. Partridge has made many presentations about the act's requirements to judges and other personnel.

This legislative history's section-by-section analysis, together with the narrative description of the act's evolution, will, we hope, be a valuable tool for federal judges called upon to interpret the legislation.

A. Leo Levin

INTRODUCTION

The basic purpose of this book is to serve as a compendium of source materials from the legislative history that may have relevance in the interpretation of title I of the Speedy Trial Act.

Both the heart and girth of the book are in part 2, beginning on page 35. That part is organized by statutory section or subsection or, in some cases, by paragraph. The derivation of statutory language is traced, and relevant materials from congressional hearings, committee reports, and floor debate are set forth verbatim.

In part 3, beginning on page 277, the full text of title I is set forth as it appeared in each of the seven major versions of the legislation prior to the current version. The part begins with the bill introduced by Representative Abner J. Mikva in 1969 and ends with the bill signed by the president on January 3, 1975.

Part 1, beginning on page 9, supplements these source materials with a brief survey of the history of the act. This survey is principally intended to acquaint the user with the broader purposes of the legislation that provide general guidance in the interpretation of individual provisions. The survey also attempts to draw together some relationships among provisions, so that the development of the language of a particular provision can be put in the context of the development of the entire bill. Finally, by discussing the roles of various legislators and others in the development of the legislation, the survey provides assistance in evaluating the authority to be ascribed to the statements of various participants in the process.

The "Chronological List of Major Source Documents" that follows this introduction provides a summary of the progress of the legislation, as well as full citations for the major source documents. Abbreviated or descriptive titles are used to identify the documents in the body of the work.

With one exception, all the source documents on the list are congressional material—committee reports, hearing records, and floor debates. The exception is the American Bar Association's *Standards Relating to Speedy Trial.* Neither the standards nor the commentary on them is reproduced verbatim in this work. The standards are referred to, however, in discussion of the derivation of the language of each section. In research about statutory provisions that have their roots in the ABA standards, the commentary that accompanies the standards is an important historical source that should not be overlooked.

Every effort has been made to ensure a high level of accuracy in the reproduction of the original source materials. However, I have undertaken to correct obvious spelling and typographical errors. The decision to do so was made for several reasons, not the least of which was the proofreading burden that would have been imposed by a decision to reproduce all such errors faithfully. I have not corrected grammatical errors or apparent slips of the tongue; I have called attention to them only when it seemed likely that the reader would wonder whether the error appeared in the original source or had been introduced in the preparation of this book.

I have also made every effort to ensure accuracy in the selection of material to be included in the book. This is obviously a much more judgmental exercise. General standards employed have been as follows.

First, I have limited myself to those sections of title I that are likely to raise problems of interpretation in the context of litigation, and have not reproduced source materials that bear only on the planning provisions of title I (18 U.S.C. §§ 3165-71). There is some discussion of the planning provisions, however, in the historical survey in part 1.

Second, in selecting materials to be reproduced from the records of congressional hearings, I have considered not only testimony but also any correspondence that is reproduced in the hearing record. I have not considered law review articles and similar materials to be part of the legislative history, even if they were reproduced in the record of the hearings.[1]

Third, because the objective was to provide a compilation of source materials from which users could make their own selections when researching questions as they arise, I have sought to apply a liberal standard of relevance. I have included all contemporaneous material that purports to interpret or restate the meaning of statutory language. I have been somewhat selective, however, about material that explains the purpose of statutory provisions in more general terms. Much of that material, such as discussion of the need for sanctions applicable to defense counsel, is highly repetitive. Much of it, such as discussion of whether the time limit for trial should be sixty days or some other number, has little interpretative significance. When confronted with fairly general materials of these types, I have selected a sample of the whole, seeking that material that appears to provide the most authoritative guidance about the background of statutory provisions, and have omitted material that did not seem to add anything. I have been similarly selective in dealing with material explaining provisions that were included in early versions of the bill but did not survive, and with explanations of amendments that were proposed but not accepted. Although the fact that a provision was considered and rejected may have great interpretative significance, material illuminating the precise meaning of such a provision is generally not likely to be useful.

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[1] As of July 1, 1980, the record of the House hearings on the 1979 amendments had not yet been published. Through the courtesy of committee staff, I have had access to galley proofs of the transcript but they did not include correspondence that may ultimately be included in the published record.

Fourth, in spite of reservations about the use of legislative history made four-and-a-half years after the fact, I have included material from the 1979 congressional committee reports purporting to explain statutory language that was neither amended nor reenacted in 1979. Such material has been reproduced only if it appeared to go beyond simple paraphrase of the statutory language; most of the 1979 report language describing the 1974 act has therefore not been included.

Four exceptions were made that resulted in omitting material that would otherwise have been included under these general rules. One exception involved the 1974 report of the Senate Judiciary Committee on the bill and a 1972 draft committee report that was a subcommittee product. Much of the language of the 1974 committee report was taken from the subcommittee's 1972 draft, with minor changes of language to accommodate the fact that the parliamentary situation was different. For example, the 1972 draft stated: "Another important difference between the original section 3163 and the new is that the latter would eliminate the exclusion of antitrust, securities, and tax cases from the act." The 1974 committee report stated: "*An* important difference between the original section 3163 *contained in S. 895* and the new *version* is that the latter would eliminate the exclusion of antitrust, securities, and tax cases from the act." (Emphasis added.) The language change reflected the fact that the bill before the committee in 1974 was S. 754 rather than S. 895, and that S. 754 as introduced had incorporated the 1972 subcommittee amendments. In other places, the only differences between the 1972 draft and the 1974 committee report were in the section numbers of cited provisions. In cases of these types, I have reproduced in full the relevant language from the report of the full committee, and noted that the language in the 1972 draft report was "virtually identical." The standard of virtual identity was a strict one; this device is used only where the differences in language appeared to be responsive only to the parliamentary situation or to represent very minor stylistic changes.

The second exception involved duplication within the 1974 Senate committee report. That report contained both a "Section-by-Section Summary" and a "Section-by-Section Analysis." The description of a provision in the "Summary" was often repeated as the introductory language to the discussion of the same provision in the "Analysis." Where this occurred, I have reproduced only the material from the "Analysis," even to the extent of ignoring language differences that appeared to be without substantive significance.

The third exception involved witnesses who testified at hearings and also submitted prepared statements. In these cases, I have reproduced relevant portions of the prepared statement. I have reproduced portions of the oral testimony only to the extent that the testimony departed from the prepared statement, and then only if the new material in the testimony represented a change or significant refinement of the position taken in the prepared statement. I have ignored differences between the prepared statement and the testimony as delivered to the extent that they appeared to be without substantive significance.

The final exception involved material from the floor debates on the 1979 amendments. In both the Senate and the House, some of the statements made on the floor were taken nearly verbatim from the committee reports. Where that occurred, I have not reproduced the material from the debates.

A number of people who are familiar with the history of the Speedy Trial Act—either from first-hand experience or from their own research—have read portions of the manuscript and offered criticism. I am indebted particularly to Ezra H. Friedman, Maureen Gevlin, H. M. Ray, and Leslie H. Rowe of the Department of Justice, Leland E. Beck of the Library of Congress's Congressional Research Service, Professor Daniel J. Freed of the Yale Law School, and Jay L. Schaefer of the California bar. I of course accept full responsibility for any errors of judgment or analysis that may have survived despite their efforts. I should note in that connection that I served in a staff capacity to the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States in preparing the amendments to the act that were proposed by the Judicial Conference in 1979. My treatment of the 1979 amendments in the historical survey undoubtedly reflects points of view that I acquired in that role.

I have also received important help from a number of my colleagues in the Research Division of the Judicial Center, particularly Anne M. Ayers, Myrna L. Brantley, Helen M. Connolly, William B. Eldridge, Patricia A. Hughes, Michael R. Leavitt, and Patricia A. Lombard. I am grateful to them not only for their contributions but also for the good cheer with which they all responded to my appeals for help. They, too, are to be absolved of responsibility for any errors that may remain.

I trust that members of the judiciary and the bar will find this volume useful in carrying out their duties under the act.

ANTHONY PARTRIDGE

CHRONOLOGICAL LIST OF MAJOR SOURCE DOCUMENTS

The abbreviated or descriptive titles used in this book are printed in **boldface.** *Title I of each bill marked with an asterisk is reproduced in full in part 3.*

ABA standards. American Bar Association, Standards Relating to Speedy Trial (approved draft, 1968). Many provisions of Congressional bills were based on these standards. The standards are not reproduced herein, but are referred to in part 2 in the discussions of the derivation of statutory language. The commentary that accompanies the standards, also not reproduced herein, is often a significant aid to interpretation.

***Mikva bill.** H.R. 14822, 91st Cong., 1st Sess., introduced by Representative Abner J. Mikva, Nov. 17, 1969. Except for differences in a section heading and the definition of "crime of violence," title I was identical in H.R. 7107, introduced by Representative Mikva in the first session of the Ninety-second Congress. The bill reproduced in part 3 is H.R. 7107.

***Original Ervin bill.** S. 895, 92d Cong., 1st Sess., introduced by Senator Sam J. Ervin, Feb. 22, 1971. Except for correction of some cross-references, title I was identical to title I of S. 3936, which Senator Ervin had introduced in the second session of the Ninety-first Congress on June 9, 1970. Because hearings were held on S. 895, the bill is generally referred to by that number.

1971 Senate hearings. *Speedy Trial: Hearings on S. 895 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 92d Cong., 1st Sess. (1971).

***1972 Senate subcommittee bill.** S. 754, 93d Cong., 1st Sess. (1973). This bill, approved by the Constitutional Rights Subcommittee but not by the full Judiciary Committee in the Ninety-second Congress, was introduced by Senator Ervin in the Ninety-third Congress.

1972 draft Senate committee report. This is printed at 1973 Senate Hearings 33-60. It is a draft report prepared for the Senate Judiciary Committee in the event that it voted to report the 1972 Senate subcommittee bill.

1973 Senate hearings. *Speedy Trial: Hearings on S. 754 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 93d Cong., 1st Sess. (1973).

***1974 Senate committee bill.** S. 754, 93d Cong., 2d Sess., reported with amendments, July 18, 1974. The bill was passed by the Senate on July 23, 1974, with neither further amendment nor debate. 120 Cong. Rec. 24667. The print reproduced in part 3 is the House print of the bill passed by the Senate.

1974 Senate committee report. S. Rep. No. 93-1021.

1974 House hearings. *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, H.R. 207, H.R. 658, H.R. 687, H.R. 773 and H.R. 4807 Before the Subcommittee on Crime of the House Committee on the Judiciary,* 93d Cong., 2d Sess. (1974). Despite their title, the hearings focused exclusively on S. 754. Title I of H.R. 7873, H.R. 207, and H.R. 687 was identical to title I of the Mikva bill as introduced in the Ninety-second Congress (H.R. 7107). Title I of H.R. 773 was identical to title I of the original Ervin bill. H.R. 658 and H.R. 4807 were derived from a bill first introduced by Representative William J. Keating in 1971; this measure, which was largely modeled on the Mikva and original Ervin bills, had no independent influence on the development of the Speedy Trial Act.

***1974 House subcommittee bill.** H.R. 17409, 93d Cong., 2d Sess., introduced by Representative John Conyers on behalf of the Subcommittee on Crime, Oct. 16, 1974.

***1974 House committee bill.** H.R. 17409, 93d Cong., 2d Sess., reported with amendments, Nov. 27, 1974.

1974 House committee report. H.R. Rep. No. 93-1508.

1974 House floor debate. The debate is reported at 120 Cong. Rec. 41773-96 (Dec. 20, 1974). The bill was passed, with further amendments, at 120 Cong. Rec. 41796. The Senate concurred in the House amendments at 120 Cong. Rec. 41619 (Dec. 20, 1974).

***1974 act.** Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076, signed by the president Jan. 3, 1975.

1979 Justice Department bill. S. 961, 96th Cong., 1st Sess., introduced by Senator Edward M. Kennedy, Apr. 10, 1979; reprinted at 1979 Senate Hearings 4-8. Also introduced as H.R. 3630, 96th Cong., 1st Sess., by Representative Peter W. Rodino, Jr., Apr. 10, 1979.

1979 Judicial Conference bill. S. 1028, 96th Cong., 1st Sess., introduced by Senator Edward M. Kennedy, Apr. 26, 1979; reprinted at 1979 Senate Hearings 9-15. Also introduced as H.R. 4051, 96th Cong., 1st Sess., by Representative Peter W. Rodino, Jr., May 10, 1979. Section numbers in the Senate and House versions do not correspond, since section 1 was used to provide a name for the amendatory legislation in the House bill but not the Senate bill. References in this work are to the Senate version.

1979 Senate hearings. *The Speedy Trial Act Amendments of 1979: Hearings on S. 961 and S. 1028 Before the Senate Committee on the Judiciary*, 96th Cong., 1st Sess. (1979).

1979 Senate committee bill. S. 961, 96th Cong., 1st Sess., reported with an amendment in the nature of a substitute, June 13, 1979.

1979 Senate committee report. S. Rep. No. 96-212.

Initial 1979 Senate floor debate. The debate is reported at 125 Cong. Rec. S8009-26 (daily ed. June 19, 1979). The committee bill was passed, without further amendment, at S8026.

1979 House Hearings. *Proposed Amendments to the Speedy Trial Act of 1974: Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 96th Cong., 1st Sess. (1979). Only galley proofs of the hearing record were available as of July 1, 1980; they did not include correspondence that may ultimately be included in the published record.

1979 House committee bill. S. 961, 96th Cong., 1st Sess., reported with amendments, July 26, 1979.

1979 House committee report. H.R. Rep. No. 96-390.

1979 House floor debate. The debate is reported at 125 Cong. Rec. H6911-16 (daily ed. July 31, 1979). The committee bill was passed, without further amendment, at H6925-26 (daily ed. July 31, 1979).

Final 1979 Senate floor debate. The debate is reported at 125 Cong. Rec. S11038-41 (daily ed. July 31, 1979). The Senate concurred in the House amendments at S11041.

1979 amendments. Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, 93 Stat. 327, signed by the president Aug. 2, 1979.

[illegible]

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[illegible]

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PART 1

Survey of the History of Title I

SURVEY OF THE HISTORY OF TITLE I

Derivation and Purposes of the 1974 Act

The Speedy Trial Act of 1974 was a product of the national concern with increasing crime in the late 1960s. Many states had adopted speedy trial legislation before the late sixties, and speedy trial bills had been introduced in Congress from time to time. The state legislation and the early congressional bills, however, had been concerned with clarifying the rights of defendants. In the late sixties, speedy trial legislation acquired a second purpose: it was seen as a vehicle for protecting society's interest in bringing criminals to justice promptly.

This is not to say that the broader societal interest in prompt disposition of criminal cases was first discovered in the latter half of the twentieth century.[1] What appears to have been new in the late sixties was the idea that this interest could be protected by combining statutory time limits with a provision for dismissal if the time limits were violated. That combination had previously been regarded as appropriate only to protect the defendant's interest in speed. Thus, time limits in state speedy trial laws were often held inapplicable unless the defendant invoked them by demanding a speedy trial, and were universally held inapplicable if the defendant consented to delay.[2] Bills introduced in Congress had included a demand requirement.[3]

The new concept apparently originated with the Advisory Committee on the Criminal Trial of the American Bar Association's Project on Minimum Standards for Criminal Justice. That committee developed the ABA's *Standards Relating to Speedy Trial*, issued as a tentative draft in May 1967 and approved by the association's House of Delegates in February 1968. Many of the features later included in the Speedy Trial Act were recommended in those standards: time limits calculated in days or months running from a specified event; the exclusion of specified periods of necessary delay; a requirement that continuances be granted only upon a showing of good cause, taking into account not only the consent of the parties but also the public interest in prompt disposition of the case; and a sanction of dismissal (with prejudice). The commentary accompanying the standards made clear that they were intended to vindicate a public interest in prompt trial in addition to the personal interest of a defendant:

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[1] *See* A. Beeley, The Bail System in Chicago 155 (1927).

[2] *See* Note, *The Right to a Speedy Criminal Trial*, 57 Colum. L. Rev. 846, 852-56 (1957); Annot., 57 A.L.R.2d 302, 321-36 (1958), as supplemented in Later Case Service (1976).

[3] *E.g.*, S. 1801, 88th Cong., 1st Sess. (1963) (Senator Morse).

> The principles underlying most of the standards in this report deal primarily with protection of the defendant, who otherwise would not be in a position to force a prompt trial. The interest of the public in the prompt disposition of criminal cases, however, must also be recognized. Speedy trial may be of concern to the defendant, as he may want to preserve the means of proving his defense, to avoid a long period of pretrial imprisonment or conditional release, and to avoid a long period of anxiety and public suspicion arising out of the accusation. From the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses.[4]

Rejecting the common rule that a defendant must make a demand in order to start the speedy trial limits running, the committee further argued that "the trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge."[5] In support of the recommendation that continuances be granted only upon a showing of good cause, the committee relied on "the notion that the need for prompt disposition of criminal cases transcends the desires of the immediate participants in the proceedings."[6]

In the closing days of the Johnson administration, a bill tentatively labeled the "Crime Reduction Act" was developed in the Department of Justice. That bill was not formally transmitted to the Congress before the change of administrations in January 1969, but a copy was obtained by Representative Abner J. Mikva. In November 1969, Representative Mikva introduced two bills based on the proposed Crime Reduction Act: the "Pretrial Crime Reduction Act" and the "Correctional Services Improvement Act."[7] He acknowledged that he had drawn heavily on the proposed Crime Reduction Act, but had split it in two to deal with pretrial and post-conviction problems separately.[8]

Title I of Representative Mikva's Pretrial Crime Reduction Act was a speedy trial title. It was substantially based on the ABA standards. Title II authorized the creation of demonstration pretrial services agencies, provided for restrictive release conditions for defendants previously convicted of crimes of violence, and authorized additional penalties for defendants convicted of crimes of violence committed while on pretrial release.

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[4] Commentary to ABA Standard 1.1.
[5] Commentary to ABA Standard 2.2.
[6] Commentary to ABA Standard 1.3.
[7] H.R. 14822 and 14823, respectively, 91st Cong., 1st Sess. (1969).
[8] 115 Cong. Rec. 34334 (1969).

At the time the Mikva bill was introduced, the Nixon administration was committed to "preventive detention" as a solution to the problem of crime committed by defendants on pretrial release.[9] Administration legislation had been introduced to amend the Bail Reform Act of 1966 to allow detention of defendants charged with "dangerous" crimes and "crimes of violence."[10] Representative Mikva offered his bill as another solution, one that "avoids the repugnant, and probably unconstitutional, alternative of preventive detention."[11] The several provisions of the bill were thus viewed as a harmonious response to a single problem:

> What I want to stress is that the Pretrial Crime Reduction Act is an approach to the problems of crime by defendants released prior to trial which does not rely on jailing criminal defendants before they are found guilty. It provides to the judge alternative methods to insure supervision and control of dangerous defendants, it provides pretrial services agencies with adequate resources to make those pretrial controls effective, and it insures that defendants are brought to trial quickly enough that the pretrial controls need be used only for a minimum time.[12]

In June 1970, speedy trial legislation was introduced in the Senate by Senator Sam J. Ervin, Jr.[13] Senator Ervin was Chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Rights. He had been the principal sponsor of the Bail Reform Act of 1966. He had held hearings on preventive detention in both 1969 and 1970,[14] and had forcefully expressed his opposition to it.[15] Although the bill he introduced was labeled the "Speedy Trial Act" rather than the "Pretrial Crime Reduction Act," and its caption emphasized the Sixth Amendment right rather than crime reduction, the Senator discussed both the defendant's interest and the broader societal interest in his introductory statement.[16] Once again, speedy trial was offered as an alternative to preventive detention.[17]

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[9] *See* President's Statement Outlining Actions and Recommendations for the District of Columbia, [1969] Pub. Papers 40, 44 (Jan. 31, 1969).

[10] S. 2600 and H.R. 12806, 91st Cong., 1st Sess. § 2 (1969).

[11] 115 Cong. Rec. 34335 (1969).

[12] *Id.* at 34334-35.

[13] S. 3936, 91st Cong., 2d Sess. (1970).

[14] *Amendments to the Bail Reform Act of 1966: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969); *Preventive Detention: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970).

[15] *E.g.*, *id.* at 1-16 (statement opening hearings).

[16] 116 Cong. Rec. 18845-46 (1970).

[17] *Id.* at 18845.

Senator Ervin's bill contained three titles. Title I set forth time limits for criminal trials; title II provided for additional penalties for defendants convicted of offenses committed while on pretrial release; and title III authorized the creation of demonstration pretrial services agencies. The speedy trial provisions of title I were not identical to those of the Mikva bill, and Senator Ervin did not identify his bill as a revision of Representative Mikva's. The common heritage of the two bills is unmistakable, however, and it is appropriate to treat them as two stages in a single development.

In February 1971, Senator Ervin's bill was introduced in the Ninety-second Congress as S. 895. This version did not include the title that had provided additional penalties for crimes committed while on pretrial release, but it was otherwise the same as the 1970 bill. Once again, Senator Ervin referred to the bill upon introducing it as "the clearly constitutional alternative to preventive detention."[18]

By the time the first hearings on the bill were held in the summer of 1971, preventive-detention legislation appeared to be dead, and the arguments for the speedy trial bill were increasingly made in terms of its desirability for its own sake.[19] Indeed, in opening the 1971 hearings, Senator Ervin emphasized that the sponsors of the legislation included both opponents and supporters of preventive detention.[20] However, the bill continued to be regarded as vindicating both the broader societal interest and the interests of those defendants for whom prompt trial is a benefit. Not every statement of the bill's purpose is a balanced statement, but expressions of both purposes are found throughout the legislative materials. The 1974 Senate committee report, for example, begins by stating that the purpose of the bill is "to make effective the sixth amendment right," but later argues that "it is trial delay, not appellate delay, which has most seriously undermined the deterrent value of the criminal process, created the crisis in pretrial crime, and which must command the primary attention of Congress at this time"; at another point, the report observes that in most cases a speedy trial is the last thing the defendant wants.[21] The 1974 House committee report begins by stating that the purpose of the bill is "to assist in reducing crime and the danger of recidivism," but later argues that "the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right."[22]

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[18] 117 Cong. Rec. 3406 (1971).

[19] Administration legislation to authorize preventive detention had been introduced in the Ninety-second Congress in May. S. 1867, 92d Cong., 1st Sess. (1971). In his introductory statement, however, Senator Roman L. Hruska, ranking minority member of the Senate Judiciary Committee, signaled the end of the battle. He took note of the constitutional doubts about the proposal and of the fact that a preventive-detention bill for the District of Columbia had been enacted in the previous Congress; he concluded that "[a] case can thus be made for deferring action on pretrial detention until we have had a chance to scrutinize its application in the District of Columbia and until the courts have resolved the chief constitutional questions that have thus far been raised." He said that he had put preventive detention in a separate bill from other bail proposals to "assure that action can be taken on the other reforms without doing battle at this time on pretrial detention." 117 Cong. Rec. 15074 (1971).

[20] 1971 Senate Hearings 9.

[21] 1974 Senate Committee Report 1, 7, 14.

As noted above, Senate hearings were held in 1971 by the Subcommittee on Constitutional Rights. In October 1972, the subcommittee reported the bill to the full Senate Judiciary Committee. No action was taken by the full committee, and the bill died there in the Ninety-second Congress. In 1973, Senator Ervin introduced the 1972 subcommittee bill as S. 754.[23] A one-day hearing on this bill was held in April 1973. The bill was reported to the full committee, with amendments, in March or April of 1974.[24] The full committee amended the bill further and reported it to the Senate in July. On July 23, 1974, the Senate passed the committee bill with neither debate nor amendment.

The major force behind the Senate bill was unquestionably Senator Ervin. The Senate committee report, however, acknowledged the important contributions of others to the amendment process, including "representatives of the Justice Department, Senators McClellan and Hruska, the various witnesses who appeared at hearings conducted by the Subcommittee on Constitutional Rights, and Professor Dan Freed of Yale Law School who during the past three years has provided invaluable advice to the Subcommittee on this legislation."[25] Professor Freed said later that discussions with staff members of the Senate committee first began seven years earlier, when he had served in the Department of Justice in the Johnson administration.[26] His influence on the final shape of the legislation is evident at a number of points.

In the House of Representatives, the Senate-passed bill was referred to the Judiciary Committee's Subcommittee on Crime, chaired by Representative John Conyers, Jr. The subcommittee made significant amendments, and the amended bill was unanimously approved; the subcommittee bill was introduced as a clean bill, H.R. 17409, on October 16, 1974.[27] The full Judiciary Committee made additional amendments, and reported the bill on November 27. On the last day of the Ninety-third Congress, December 20, 1974, the bill was taken up by the House. Representatives Conyers and William S. Cohen, the ranking minority member of the Subcommittee on Crime, acted as principal spokesmen for the committee bill. Many technical amendments were adopted, as well as a major amendment to the sanction provisions, before the bill was passed. The bill was transmitted to the Senate, which accepted the House amendments on the same day.

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[22] 1974 House Committee Report 8, 11.

[23] *See* 119 Cong. Rec. 3263 (1973) (remarks of Senator Ervin).

[24] *See* 1974 Senate Committee Report 2, 6 (inconsistent statements about date of subcommittee action). The text of the 1974 subcommittee bill and the draft committee report that accompanied it are not in the public record.

[25] 1974 Senate Committee Report 2.

[26] Testimony of Daniel J. Freed, 1974 House Hearings 262.

[27] 120 Cong. Rec. 35964 (1974); *see* 1974 House Committee Report 9.

In presenting the House-passed bill to the Senate, Senator Ervin described it as expressing Congress's concern with both crime control and "elementary justice," and referred particularly to defendants held in jail before trial.[28] He then summarized the purposes of the bill as follows:

> Those of us in the Congress who have been working on this problem realize that speedy trial will never be a reality in the Federal courts until Congress makes clear to all that it will no longer tolerate delay. Unfortunately, while it is in the public interest to have speedy trials, the parties involved in the criminal process do not feel any pressure to go to trial. The court, defendant, his attorney, and the prosecutor may have different reasons not to push for trial, but they all have some reason. The overworked courts, prosecutors, and defense attorneys depend on delay in order to cope with their heavy caseloads. The end of one trial only means the start of another. To them, there is little incentive to move quickly in what they see as an unending series of cases. The defendant, of course, is in no hurry for trial, because he wishes to delay his day of reckoning as long as possible.
>
> I believe, after years of studying this problem, that S. 754 can begin to end this seemingly hopeless morass. The bill is based upon the premise that the courts, undermanned, starved for funds, and utilizing 18th century management techniques, simply cannot cope with burgeoning caseloads. The consequence is delay and plea bargaining. The solution is to create initiative within the system to utilize modern management techniques and to provide additional resources to the courts where careful planning so indicates.[29]

Throughout the congressional consideration of speedy trial legislation, the Judicial Conference of the United States opposed the enactment of title I.[30] In April 1972, the Supreme Court approved the addition of a new rule 50(b) to the Federal Rules of Criminal Procedure, under which each district court was required to develop a plan for the prompt disposition of criminal cases.[31] Subsequently, representatives of the judiciary argued that this approach should at least be given an opportunity to prove itself before Congress considered imposing time limits through legislation.[32]

The position of the Department of Justice was somewhat less consistent, perhaps reflecting the unusual turnover of attorneys general during the period, but the department always had serious reservations about mandatory dismissal with prejudice. In his statement at the 1971 hearings, Assistant Attorney General William H. Rehnquist expressed this concern about the sanction of dismissal with prejudice, observing that cases might be lost under such a provision even though the prosecutor had no responsibility for the delay.[33] Nevertheless, he said the department would not categorically oppose mandatory dismissal:

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[28] 120 Cong. Rec. 41618 (1974).

[29] *Id.*

[30] Judicial Conference of the United States, 1970 Proceedings 17, 55-56; 1971 Proceedings 39; 1973 Proceedings 76; 1974 Proceedings 58.

[31] 406 U.S. 979, 999-1000.

[32] *E.g.*, Judicial Conference of the United States, 1974 Proceedings 58; Prepared Statement of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 176-78.

> For it may well be, Mr. Chairman, that the whole system of federal criminal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel, and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.[34]

Mr. Rehnquist indicated that the Department would support the concept of title I if it were coupled with habeas corpus reform, imposition of the statutory time limits in stages, and reasonable sanctions applicable to the defense.[35] In October 1971, while continuing to maintain that the department's support was conditioned on including reform of habeas corpus practice, Mr. Rehnquist submitted a proposed revision of title I. That measure would have made the time limits more generous in several respects, but it retained the sanction of dismissal with prejudice.[36]

In October 1972, in a letter to Senator Ervin, Deputy Attorney General Ralph E. Erickson indicated that the department had reconsidered its position, and was opposed to "legislative mandating of inflexible time limits" and mandatory dismissal with prejudice. He urged Congress to delay action until experience had been gained under rule 50(b).[37] Thereafter, the department continued to oppose title I.[38] Finally, with Congress evidently determined to enact the legislation, but at a time when the pocket veto would probably be an option available to the president, Attorney General William B. Saxbe indicated that the department would accept the bill if district judges were given the discretion to dismiss cases either with prejudice or without.[39] An amendment to effectuate that compromise was reluctantly introduced by Representative Cohen with the acquiescence of Representative Conyers.[40] The bill was enacted with the amendment included, and President Ford signed it on January 3, 1975.

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[33] Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 107 (pp. 226-27 *infra*).

[34] Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 107.

[35] *Id.* at 112-14.

[36] "Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261-63.

[37] Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Oct. 3, 1972, at 1973 Senate Hearings 184-85, 187-90. (The date of the letter is erroneously printed as Oct. 3, 1973.)

[38] *See* Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 116; Letter to Senator Ervin from Attorney General Elliot L. Richardson, Oct. 11, 1973, at 1974 House Hearings 393-94; Prepared Statement of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 196-97; Letter to Representative Peter W. Rodino, Jr., from Attorney General William B. Saxbe, Nov. 15, 1974, at 1974 House Committee Report 54-55.

Phased Compliance and the Planning Process

One of the central questions in the development of the 1974 act was how compliance with the act's requirements was to be achieved. Doubts were expressed about the system's capacity to implement the new standards in the short time allowed under the early bills.[41] Moreover, Department of Justice representatives criticized the proposed legislation for mandating speed without attacking the causes of delay.[42] Those two concerns were reflected in the development of the bill's provisions governing the phasing-in of time limits and planning for compliance.

Under the Mikva bill, both the permanent time limits and the dismissal sanction were to become effective eighteen months after enactment, with an earlier effective date for defendants in custody and those accused of crimes of violence. Each district court was required to file, within one year of enactment, a plan that was to "include a description of the procedural techniques, innovations, systems, and other methods by which the district court has expedited or intends to expedite the trial or other disposition of criminal cases" in order to comply with the act. The Judicial Conference was then to report to Congress, detailing the district plans "and the legislative proposals and appropriations necessary to achieve compliance."[43]

In the original Ervin bill, a number of dates were tied to the "effective date of this chapter," but that date was not specified. The time limits were to take effect eighteen months after the effective date, except that earlier implementation was provided for defendants in custody and those accused of crimes of violence. District court plans were due ninety days after the effective date.[44]

Beginning with the 1972 Senate subcommittee bill, the schedule for implementation of the statute began to be stretched out and the planning provisions became increasingly elaborate. That bill introduced the system of progressively more restrictive time limits, and provided that the permanent time limits would take effect three years after enactment.[45] For defendants in custody and those designated as high risk, it introduced an interim 90-day time limit—the forerunner of 18 U.S.C. § 3164—which was to expire when the permanent time limits became effective.[46] The 1972 Senate subcommittee bill required the submission of two plans, one due one year after enactment, and one due two years after enactment.[47] Introducing the bill in the Ninety-third Congress, Senator Ervin referred to the planning process as the "vital link" between the goal of speedy trials and the resources needed to implement it.[48]

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[39] Letter to Representative Peter W. Rodino, Jr., from Attorney General William B. Saxbe, Dec. 13, 1974, at 120 Cong. Rec. 41619-20.

[40] 120 Cong. Rec. 41793-94 (1974) (*see* pp. 219-20 *infra*).

[41] *See* pp. 86-89 *infra*.

[42] Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, July 19, 1972, at 1973 Senate Hearings 181; Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 111.

[43] Mikva Bill §§ 3163, 3164(a), (d) (pp. 283, 285 *infra*).

[44] Original Ervin Bill §§ 3163, 3164(a) (pp. 290, 292 *infra*).

Still another transitional year was added before the bill emerged from the Senate Judiciary Committee in 1974, so that the permanent time limits would not take effect until four years after enactment.[49] Moreover, the 1974 Senate committee bill provided that the more generous time limits of the transitional period would not be enforced with sanctions: the dismissal sanction also would take effect four years after enactment, and a provision barring reprosecution except in "exceptional circumstances" would take effect two years after that.[50] As contrasted with the 1972 Senate subcommittee bill, the planning provisions of the 1974 Senate committee bill were quite detailed: district planning groups were mandated, with a specified membership that included prosecution and defense representation; the groups were enjoined to consider reforms in the criminal justice system as well as changes in the practices of individual courts; and the contents of the plans they were to formulate were prescribed in some detail. Plans were due one, three, and five years after enactment.[51] Echoing Senator Ervin's introductory statement, the 1974 Senate committee report described this "elaborate planning and reporting process" as "the vital link with the appropriations process."[52]

> The Congress will have two alternatives. It can appropriate to the criminal justice system those additional resources which are proved to be necessary to achieve the goal set by law in this bill. If the criminal justice system has fulfilled its responsibilities to the statute, to the Sixth Amendment, and to justice, any failure of Congress to do its part will

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[45] 1972 Senate Subcommittee Bill §§ 3161(b)(1)(B), 3163 (pp. 296, 303 *infra*).

[46] *Id.* § 3164 (p. 303 *infra*).

[47] *Id.* § 3165(a) (p. 305 *infra*).

[48] 119 Cong. Rec. 3264 (1973).

[49] 1974 Senate Committee Bill §§ 3161(f), (g), 3163(a), (b) (pp. 312, 313, 320, 321 *infra*).

[50] *Id.* §§ 3162(c), 3163(c) (pp. 318, 321 *infra*).

[51] *Id.* §§ 3165-69 (pp. 323-33 *infra*).

[52] 1974 Senate Committee Report 22.

> be evident. Congress would then have to bear the burden of imposing obligations on others, while failing to meet its own.[53]

The House subcommittee and committee bills maintained the Senate's four-year schedule for phasing in the time limits, although they contained different transitional limits for the fourth year following enactment.[54] However, in rejecting the Senate provision that would have permitted reprosecution in "exceptional circumstances" when a case was dismissed on speedy trial grounds, the House subcommittee made the sanction of dismissal with prejudice fully applicable at the end of the four-year phase-in period.[55] The planning provisions were amended in both subcommittee and full committee, but the general thrust was unchanged.[56] The 1974 House committee report referred to the planning process as "[t]he heart of the speedy trial concept embodied in" the bill—a provision "linking the time standards with a commitment on the part of the legislature to determine the needs of the courts."[57]

The final change in the implementation schedule of the original act was made in House floor amendments offered by Representative Ray Thornton. Those amendments tied all the effective dates to July 1, 1975, instead of the date of enactment, effectively setting the schedule back six months; according to their sponsor, the purpose was to "tie the effective date of the act to the necessary appropriations to implement the act."[58] That was apparently a reference to the need for appropriations to implement the planning process. The amendments were accepted by Representative Conyers and were adopted without further discussion.[59] Hence, the act as passed provided that both the permanent time limits and the dismissal sanction would take effect July 1, 1979.

Purposes of the 1979 Amendments

In April 1979, in anticipation of the July 1 deadline for full implementation of time limits and sanctions, both the Department of Justice and the Judicial Conference submitted bills to amend the Speedy Trial Act. The bills differed in some respects, but many of their provisions were identical. The major feature of both bills was a proposed expansion of the permanent time limits. In place of the 30-day period from arrest to indictment, both bills would have provided a 60-day period.[60] In place of the 10-day period from indictment to arraignment and the 60-day period from arraignment to commencement of trial, both bills would have provided a single 120-day period from indictment to commencement of trial.[61] Both bills also included a new 30-day minimum period within which a defendant could not be brought to trial without his consent.[62] The Department of Justice also proposed that the 90-day interim time limit for defendants in custody and those designated as high risk be made permanent, so that the expansion of the basic time limits would not affect the scheduling of trials for such defendants.[63]

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[53] *Id.* at 23.

[54] 1974 House Subcommittee and Committee Bills §§ 3161(f), (g), 3163(a), (b) (pp. 338, 339, 347, 348 *infra*).

[55] 1974 House Subcommittee Bill §§ 3162(a), 3163(c) (pp. 345, 348 *infra*).

[56] *Id.* §§ 3165-69 (pp. 350-60 *infra*); 1974 House Committee Bill §§ 3165-71 (pp. 363-71).

[57] 1974 House Committee Report 23.

[58] 120 Cong. Rec. 41789, 41790 (1974).

[59] *Id.* at 41789.

The Judicial Conference proposed that the expansion of the time limits be accompanied by the elimination of automatically excluded periods of time. Its bill would have permitted a trial judge to extend the time limits because of certain listed events, but only if the extension was "reasonably necessitated" by such events. In the case of pretrial proceedings, the listed event was "pretrial proceedings of unusual complexity."[64] The Department of Justice bill, on the other hand, did not propose a change in the basic framework of the exclusion provisions, and proposed that the exclusion for "delay resulting from hearings on pretrial motions" be amended to exclude "delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon."[65] The Judicial Conference bill thus contemplated that the proposed 120-day period to commencement of trial would be the norm; the Department of Justice bill contemplated that it would be extended in any case in which pretrial motions were filed.

The proposals for amendment were considered in an atmosphere of some urgency. In transmitting the Justice Department's bill, the Attorney General had stated that "dismissals could occur in as many as 17 percent of criminal cases filed" if the act were permitted to become fully effective according to its original terms.[66] Although substantial doubt was cast on the validity of that figure,[67] it is clear that the fear of a wave of dismissals was an important factor in the congressional deliberations.[68]

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[60] 1979 Justice Department Bill § 2; 1979 Judicial Conference Bill § 1.

[61] 1979 Justice Department Bill § 3 (p. 69 *infra*); 1979 Judicial Conference Bill § 2.

[62] Sections cited in note 61 *supra*.

[63] 1979 Justice Department Bill §§ 6, 7 (p. 250 *infra*).

[64] 1979 Judicial Conference Bill § 3 (pp. 94-95, 109 *infra*).

[65] 1979 Justice Department Bill § 5(c) (p. 109 *infra*).

[66] Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4329 (daily ed. Apr. 10, 1979).

[67] *E.g.*, Testimony of Judge Alexander Harvey II, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1979 Senate Hearings 66; Testimony of Allen R. Voss, Director, General Government Division, General Accounting Office, 1979 House Hearings. (Citation to 1979 House Hearings based on galley proofs.)

[68] *See* Remarks of Representatives Peter W. Rodino, Jr., James F. Sensenbrenner, Jr., Robert McClory, and John M. Ashbrook, 125 Cong. Rec. H6914-15 (daily ed. July 31, 1979); Remarks of Senator Edward M. Kennedy, 125 Cong. Rec. S11040 (daily ed. July 31, 1979).

Hearings were held before the Senate Judiciary Committee in May 1979, with Senator Joseph R. Biden, Jr., presiding. Some witnesses argued that the act's provisions regarding excludable time were being too narrowly interpreted by some members of the judiciary, and that the original time limits were reasonable if the exclusions were interpreted more generously; guidelines that had been issued by the Judicial Council of the Second Circuit were praised for containing more liberal interpretations that would make the statute workable.[69] Others argued that the statute should establish a reasonable norm and that the exclusions should be used sparingly.[70] A consensus emerged that the original time limits were indeed unduly short if the exclusions were strictly construed. By the second day of the hearings, the serious question was whether to maintain the original time limits with generous exclusions or to provide for expanded time limits with narrow exclusions.[71]

The bill reported to the Senate on June 13 did not in form expand the time limits. It merged into one 70-day time limit the previous 10-day time limit to arraignment and 60-day time limit to trial, but the committee concluded "that a case cannot, at present, be made for a fundamental policy change in the Act by an enlargement of the time limits."[72] However, the committee bill did provide unambiguously for a generous exclusion for pretrial motions, covering the period from the filing of the motion through the hearing. It also included amendments to the exclusion for "ends of justice" continuances that were calculated to liberalize their use, particularly to accommodate the scheduling problems of counsel. For those who had interpreted the original exclusions strictly, the practical impact of those changes was a very substantial expansion of the post-indictment time limits. Indeed, the report of the Senate Judiciary Committee observed that the amended exclusion for pretrial motions "could become a loophole which could undermine the whole Act," and urged the adoption of rules that would limit the amount of time consumed—and therefore excluded—in the handling of such motions.[73]

In spite of the fact that the stated time limits for ordinary defendants were not expanded, the Senate committee accepted the Justice Department suggestion that the 90-day limit for high-risk defendants and those in custody be made permanent. The bill also contained, in somewhat modified form, the 30-day minimum period within which trial could not commence without the defendant's consent.

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[69] Testimony of Daniel J. Freed, 1979 Senate Hearings 74-75; Prepared Statement of Judge Robert J. Ward, 1979 Senate Hearings 147-48. The Second Circuit guidelines are reproduced at 125 Cong. Rec. S8014-20 (daily ed. June 19, 1979).

[70] Testimony of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 32, 34; Testimony of Judge Robert Peckham, 1979 Senate Hearings 135.

[71] *See* Opening Statement of Senator Joseph R. Biden, Jr., at Second Day of Hearings, 1979 Senate Hearings 72 (p. 110 *infra*); Testimony of Daniel J. Freed, 1979 Senate Hearings 73-75.

[72] 1979 Senate Committee Report 16.

[73] *Id.* at 34 (pp. 114-15 *infra*).

The 1979 Senate committee bill also provided for a two-year postponement of the effective date of the dismissal sanction. Such a postponement had been suggested by the General Accounting Office, as an alternative to substantive amendment, on the ground that it would afford more time to study the operation of the statute without risking dismissals before determining whether substantive change was necessary.[74] The committee accepted this rationale even while making substantive amendments, adding the point that newly created judgeships were still being filled and that an increase in prosecutorial resources was contemplated. It argued that there was a need to see what impact those additional resources would have.[75]

The Senate committee's bill was passed, without floor amendment, on June 19, 1979. Two days of hearings were held in June and July by the House Judiciary Committee's Subcommittee on Crime, still chaired by Representative Conyers. In addition to making some minor changes in the Senate bill, the subcommittee changed the postponement of the dismissal sanction from two years to one year. The subcommittee bill was accepted without amendment by the Judiciary Committee, whose report emphasized, as a reason for deferring the sanctions, the relief that would be provided when the newly created judgeships were filled.[76] The bill passed the House without amendment on July 31, 1979. The Senate accepted the House amendments on the same day, and President Carter signed the bill on August 2.

Major Legislative Issues

One of the central issues in the development of the legislation has already been discussed under the heading, "Phased Compliance and the Planning Process." That issue involved the schedule and procedures that would enable the criminal justice system to prepare for implementation of the permanent rules of the Speedy Trial Act. We turn now to five major issues in the legislative development of the permanent rules themselves.

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[74] Testimony of Allen R. Voss, Director, General Government Division, General Accounting Office, 1979 Senate Hearings 18-19, 25-26; U.S. General Accounting Office, Speedy Trial Act—Its Impact on the Judicial System Still Unknown 21-23 (1979).

[75] 1979 Senate Committee Report 16, 28.

[76] 1979 House Committee Report 8-9.

Definitions of the Time Limits

Representative Mikva's original bill provided a 60-day period to trial for defendants accused of violent crimes and a 120-day limit for defendants accused of other crimes. All subsequent bills through the 1974 enactment provided for a 60-day time limit. In spite of a good deal of criticism that this period was too short, the number "60" remained invulnerable to change. But its practical impact changed materially as successive amendments changed the date from which the 60 days to trial was to be measured and added other time limits in front of it. Finally, in the 1979 amendments, the 60-day time limit to trial was merged with a 10-day limit to arraignment, and a 70-day time limit to trial was created.

Up through the 1972 Senate subcommittee bill, the effort appears to have been to implement the recommendations of the ABA standards. Standard 2.2(a) recommended that the time limit to trial be measured "from the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer." The commentary to this standard made it clear that the charge referred to was an indictment, information, or other charge sufficient to support prosecution.

In the Mikva bill, the time to trial was to be measured "[f]rom the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed earlier, from the date of such filing."[77] The original Ervin bill eliminated the word "earlier" from this language, thus creating a troublesome ambiguity about the meaning of the exception clause.[78] The 1972 Senate subcommittee bill returned to the scheme of the Mikva bill, but service of a summons was substituted for issuance as an event that would cause the time limit to begin.[79]

Putting aside the ambiguous provision of the original Ervin bill, these early bills shared two notable characteristics, both derived from the ABA standards. First, they imposed a single time limit that would begin with arrest or summons prior to indictment and that was therefore expected to accommodate both pre-indictment and post-indictment proceedings. Second, in the event that indictment or information preceded arrest or summons, they provided that the time limit would be triggered by an indictment or information, so that apprehension of the defendant was one of the things to be accomplished within the limit. The commentary to ABA standard 2.2(a) had asserted that delay following the formal charge can operate to the disadvantage of the defendant whether or not he is within control of the court, and that the time limit should therefore be triggered by the filing of the charge.

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[77] Mikva Bill § 3161(a)(1) (p. 280 *infra*).

[78] Original Ervin Bill § 3161(b)(1) (p. 287 *infra*).

[79] 1972 Senate Subcommittee Bill § 3161(b)(1)(A) (p. 296 *infra*).

The first major change was made in the 1974 Senate committee bill, which produced the separate 30-day time limit for the filing of an information or indictment and made the 60-day time limit to trial run from the date an information or indictment is filed (and made public).[80]

A separate 10-day time limit to arraignment was introduced in the 1974 House subcommittee bill, making the 60-day limit to trial run only from arraignment. More important than the additional time, however, may have been the language providing that the 10-day period would begin with the *later* of the date of the formal charge or the date the defendant "has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending."[81] The separate time limit to arraignment had been suggested by the Department of Justice.[82] The House committee report did not highlight the fact that the provision delayed the commencement of any time limit when an indictment precedes the defendant's initial appearance in the district of prosecution. There is some reason to question whether the significance of the change was understood. Indeed, some passages in the 1974 House committee report are apparently based on the assumption that the time limits would in fact be running in such circumstances.[83]

In the 1979 amendments, the time limit to arraignment and the time limit to trial were merged in response to expressions of concern that the short limit to arraignment was unnecessarily creating compliance difficulties.[84] The merger of the two intervals did not in form extend the total allowable time to trial from indictment or initial appearance, but it did have the effect of enlarging the time slightly in cases in which less than ten days elapse before arraignment.

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[80] 1974 Senate Committee Bill §§ 3161(b), (c) (p. 311 *infra*).

[81] 1974 House Subcommittee Bill § 3161(c) (p. 337 *infra*).

[82] "Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 199-200 (pp. 61-62 *infra*); *cf.* Prepared Statement of James L. Treece, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 206-07 (pp. 63-64 *infra*) (argument against commencing time limits before defendant appears in charging district).

[83] *See* 1974 House Committee Report 31 (p. 67 *infra*) (transportation of defendants from foreign districts); *id.* at 36 (p. 193 *infra*) (exclusion of time for proceedings to obtain defendants imprisoned on other convictions).

[84] *E.g.*, Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 52 (pp. 70-71 *infra*); Prepared Statement of Judge Alexander Harvey II, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1979 Senate Hearings 62 (p. 72 *infra*).

The Exclusion for "Other Proceedings"

The practical meaning of the statute was influenced not only by changes in the definitions of the time limits, but also by the development of the provisions for excluding various periods of time from the computations. Prior to the hearings on the 1979 legislation, however, the legislative materials do not evidence any recognition that a change in the length of a time limit might be traded off against a change in the provisions governing time to be excluded from the count.

The debate in this area has involved principally the exclusion of any "period of delay resulting from other proceedings concerning the defendant." The quoted language, accompanied by a list of examples of such "other proceedings," appeared in the ABA standards and has appeared in each version of the legislation from the Mikva bill forward.[85] The list of examples of "other proceedings" changed somewhat from one version of the bill to another, although "hearings on pretrial motions" appeared as an example in all bills through the 1974 act.

The Mikva bill and the original Ervin bill offered little guidance on the meaning of "delay resulting from other proceedings concerning the defendant." At the 1971 Senate hearings, Professor Freed observed that delay "resulting from hearings on pretrial motions" could be read, at one extreme, as defining a period that began with the date of filing the motion and ended on the date on which the court issued its decision, or, at the other, as "court days actually consumed in hearing a motion." The former, he said, "seems excessive"; if the latter was meant, the language should be clarified.[86] Other witnesses also advocated clarifying amendments.[87]

Neither in 1971 nor in the later history did anyone suggest that the period of delay "resulting from" a proceeding might be something other than the duration of the proceeding itself. The perceived ambiguities involved only the calculation of that duration.

The 1972 Senate subcommittee bill resolved the ambiguities with a strict interpretation, providing that the exclusion for delay resulting from other proceedings covered "only such court days as are actually consumed" and that time during which a matter is under advisement or awaiting decision could not be excluded.[88] In 1974, the full Senate Judiciary Committee rejected that solution. It eliminated the language restricting the exclusion to "court days," and added language stating that delay from "other proceedings" includes delay "reasonably attributable to any period during which any proceeding concerning the defendant is actually under advisement."[89] In explaining that change, the 1974 Senate committee report discussed only the question whether the exclusion should cover time during which a matter is under advisement.[90] No mention was made of the intended resolution of other ambiguities that the subcommittee had resolved with the "court days" language. It was therefore unclear whether the exclusion was limited to court days and time under advisement, or whether some broader interpretation was appropriate. That ambiguity was not remarked upon in the subsequent legislative proceedings in 1974, and it was unresolved in the final bill. The House subcommittee added the 30-day limitation on the time that can be excluded while a matter is under advisement.[91]

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[85] ABA Standard 2.3(a); Mikva Bill § 3161(b)(1) (p. 281 *infra*); Original Ervin Bill § 3161(c)(1) (p. 288 *infra*); 1972 Senate Subcommittee Bill § 3161(c)(1)(A) (p. 298 *infra*); 1974 Senate Committee Bill § 3161(h)(1) (p. 313 *infra*); 1974 House Subcommittee and Committee Bills § 3161(h)(1) (p. 339 *infra*); 1974 Act § 3161(h)(1) (p. 376 *infra*); 18 U.S.C. § 3161(h)(1).

[86] "Additional Amendments to S. 895," Appendix A to Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 147-48 (p. 99 *infra*).

[87] Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35 (p. 98 *infra*); "Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 71 (p. 98 *infra*). *See also* Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258 (p. 100 *infra*).

As has already been remarked, the consideration of the 1979 amendments included much discussion of the merits of broad and narrow interpretations of the "other proceedings" exclusion. The legislation that resulted clearly favored the more generous interpretations. Unlike the 1972 Senate subcommittee bill, which had applied the restrictive "court days" language to the entire exclusion for "other proceedings concerning the defendant," the 1979 legislation added liberalizing language only to some of the examples of such proceedings. The critical change was in the example regarding pretrial motions, which now reads "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." No similar change was made in the reference to delay resulting from an interlocutory appeal or to delay resulting from trial on other charges. Because the entire paragraph governing the exclusion for "other proceedings" was reenacted in the 1979 act, however, it seems appropriate to treat the expanded definition of delay resulting from pretrial motions as indicative of the meaning to be ascribed to the "other proceedings" exclusion generally.

Calendar Congestion

Another issue that was important in the development of the legislation was how to respond to calendar congestion. Two lines of authority bear on that issue. One involves the individual judge's case-by-case authority to extend time limits, in effect, by granting continuances. The other involves administrative authority to suspend the operation of the time limits on a court-wide basis for a limited period.

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[88] 1972 Senate Subcommittee Bill § 3161(c)(1)(B) (p. 298 *infra*).
[89] 1974 Senate Committee Bill § 3161(h)(1)(vii) (p. 314 *infra*).
[90] 1974 Senate Committee Report 36 (p. 104 *infra*).
[91] 1974 House Subcommittee Bill § 3161(h)(1)(G) (p. 340 *infra*).

The ABA standards took the case-by-case approach. Standard 2.3(b) recommended exclusion from the time limits of "[t]he period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances." The commentary indicated that delay attributable to "chronic congestion" should not be excused, but that some leeway was necessary to insure flexibility when certain unique, nonrecurring events, such as mass public disorder, produced an inordinate number of cases for court disposition. It also indicated that the exclusion would accommodate exceptional circumstances that resulted in the unavailability of the prosecutor or judge at the time the trial was scheduled. The standards included no provision for administrative suspension of the time limits.

The Mikva bill took the opposite approach. It included provisions permitting the Judicial Conference to approve a suspension of the time limits if a district court was unable to comply "because of limitations of manpower or resources."[92] But it had no provision for excluding time if an individual judge was compelled to continue a case because of calendar congestion. It did provide an exclusion for continuances granted "upon a showing of good cause," but there was no provision for granting such a continuance sua sponte, and a showing of "special circumstances peculiar to that case" was required if the continuance was on the prosecutor's motion.[93]

The original Ervin bill retained the Mikva bill's provisions for administrative suspension, with only minor changes in language.[94] It included provisions for "good cause" continuances that were considerably more restrictive than those of the Mikva bill, but added a provision permitting continuances, at the request of either party, upon a finding "that, unless such a continuance is granted, the ends of justice cannot be met."[95] Continuances granted sua sponte were not covered, suggesting that the draftsmen did not contemplate application of this provision to cases in which the court needed a continuance because of scheduling difficulties.

In the 1972 Senate subcommittee bill, there was no provision for administrative suspension of the time limits. That bill introduced the plan for phasing in the application of the time limits, and the draft committee report that accompanied it said that the delay in full implementation should eliminate the need for relief through suspension. Moreover, it argued, "any unforeseen emergency which might call for a suspension of the speedy trial time limits would certainly fall within the 'ends of justice' continuance provision,"[96] which in the subcommittee's bill included the power to grant such continuances sua sponte.[97] At a different point in the draft committee report, however, it was stated that "the dismissal sanction applies even if there is court congestion, for that is the very problem the bill is designed to address."[98]

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[92] Mikva Bill §§ 3164(b), (c) (pp. 284, 285 *infra*).

[93] *Id.* §§ 3161(b)(6), (7) (p. 282 *infra*).

[94] Original Ervin Bill §§ 3164(b), (e) (pp. 293, 294 *infra*).

[95] *Id.* § 3161(c)(8) (p. 290 *infra*).

The 1974 Senate committee bill amended the sanction provision to allow reprosecution of a case following a speedy trial dismissal if "the government has presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided." The provision further stated that "general congestion of the court's docket" was not among the exceptional circumstances that would warrant such reprosecution.[99] It was implicit in that language that "general congestion of the court's docket" was not a circumstance that would have obviated the need for dismissal in the first place. But nothing in the Senate history indicated what the phrase "general congestion" referred to, or whether there are some kinds of congestion that are not "general."

In the House subcommittee, provisions for administrative relief were restored in the form of the "judicial emergency" provision.[100] In addition, the language about "general congestion" was moved from the sanction provision to the "ends of justice" continuance provision, so that it explicitly forbade continuances "because of general congestion of the court's calendar."[101] The new "judicial emergency" provision stated that the time limits could not be suspended, without the consent of Congress, within six months of the expiration of a previous suspension. That prohibition raised the possibility that administrative relief would in some circumstances be unavailable to deal with unforeseen crises. One might infer that the draftsmen believed that unforeseen crises could be handled under the provision for "ends of justice" continuances. There is nothing in the 1974 House committee report to provide guidance on that question, however. In a colloquy on the House floor, Representatives Cohen and Conyers suggested that an "ends of justice" continuance might be used if the scheduling of relatively routine cases was delayed by the trial of a protracted case, but only if efforts to secure the help of other judges had been made and had failed.[102]

The 1979 amendments included a new provision, section 3174(e), designed to expedite the procedure for administrative suspension of the time limits in cases in which the need for suspension "is of great urgency." The addition of that subsection, which was suggested by the Judicial Conference and the Department of Justice,[103] suggests at least a lack of confidence that the "ends of justice" provision would accommodate such situations. The relevant portions of the "ends of justice" exclusion were not changed by the 1979 legislation. Thus, a good deal of ambiguity remains as to whether some calendar congestion falls short of being "general congestion," and may therefore be considered ground for an "ends of justice" continuance under section 3161(h)(8).

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[96] 1972 Draft Senate Committee Report, at 1973 Senate Hearings 57 (p. 154 *infra*).
[97] 1972 Senate Subcommittee Bill § 3161(c)(8) (p. 300 *infra*).
[98] 1972 Draft Senate Committee Report, at 1973 Senate Hearings 44 (p. 151 *infra*).
[99] 1974 Senate Committee Bill § 3162(b) (p. 318 *infra*).
[100] 1974 House Subcommittee Bill § 3172 (p. 361 *infra*).
[101] *Id.* § 3161(h)(8)(C) (p. 343 *infra*).
[102] Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41792-93 (pp. 173-74 *infra*).

Flexibility to Accommodate the Needs of Particular Cases

The provision excluding time consumed by continuances granted in the "ends of justice," discussed above in the context of calendar congestion, was primarily regarded as serving another purpose: to provide the court with discretion to respond to characteristics of individual cases not adequately covered by the automatic exclusions. The treatment of the provision in the legislative history materials reflects the tension of two conflicting concerns. On the one hand, the proponents of the legislation were seeking mandatory time limits; overly broad discretion would undercut that goal. On the other hand, it was recognized throughout the process that some flexibility was essential.

As was noted above, the "ends of justice" language first appeared in the original Ervin bill. The separate "good cause" provisions of the Mikva and original Ervin bills were eliminated in the 1972 Senate subcommittee bill. Also eliminated in that bill was a provision that had exempted antitrust, securities, and tax cases from the scope of the legislation;[104] this action was apparently in response to suggestions that case complexity was a matter to be considered on a case-by-case basis.[105] The subcommittee bill authorized continuances on the basis of findings "that the ends of justice and the best interest of the public as well as the defendant would be served thereby."[106] The draft committee report that accompanied the bill referred to three kinds of situations in which such a continuance might be appropriate. One involved situations in which continuation of the proceedings would otherwise be impossible or would be a miscarriage of justice—for instance, if the judge trying the case became ill, or the defendant or his counsel became ill, or the court permitted counsel to resign from the case. The second involved unusual complexity. The third involved cases in which, in order to stop continuing criminal activity, the government was compelled to initiate prosecution (and thereby trigger the time limits) before investigation was complete. Except in these situations, the draft report expressed the intent that the provision should rarely be used.[107]

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[103] 1979 Judicial Conference Bill § 5(4) (p. 272 *infra*); 1979 Justice Department Bill § 8 (p. 271 *infra*).

[104] Mikva Bill § 3163(b) (p. 283 *infra*); Original Ervin Bill § 3163(b) (p. 292 *infra*).

[105] *See* 1972 Draft Senate Committee Report, at 1973 Senate Hearings 55-56 (p. 153 *infra*); Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 36 (p. 140 *infra*); Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 256 (p. 145 *infra*).

[106] 1972 Senate Subcommittee Bill § 3161(c)(8) (p. 300 *infra*).

In the 1974 Senate committee bill, the required finding was changed so that the ends of justice must "outweigh" the best interest of the public and the defendant in a speedy trial. In addition, the three factors that had been mentioned in the 1972 draft committee report were, in essence, written into the bill as factors that, "among others," a judge shall consider in determining whether to grant an "ends of justice" continuance.[108] With the exception of situations involving those three factors, the 1974 Senate committee report again expressed the intent that the "ends of justice" continuance "should be rarely used."[109] In the House of Representatives, "to prevent abuse,"[110] the provision was amended to prohibit granting an "ends of justice" continuance "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

In the more liberal atmosphere prevailing at the time of the 1979 amendments, several amendments were made to the provision authorizing "ends of justice" continuances. One significant change made clear that conflicts of government and defense counsel could be accommodated under this provision, as could defendants' difficulties in obtaining counsel.[111] New language was also added permitting "ends of justice" continuances to allow counsel "the reasonable time necessary for effective preparation," even in cases that are not so unusual or so complex as to make preparation within the time limits unreasonable.[112] In suggesting that the time limits otherwise computed may be too short to permit adequate preparation, even in a case that is neither unusual nor complex, this new language appears to have introduced a new ambiguity about the appropriate grounds for "ends of justice" continuances. There can be no question, however, that its general purpose was to enlarge the court's flexibility to extend the time limits in particular cases.

The Dismissal Sanction

The issue that generated the most controversy in the development of the legislation was probably the dismissal sanction. Proponents of the legislation regarded the threat of dismissal as the critical element that made the time limits more than merely precatory. However, fears were expressed that criminals would unreasonably escape from prosecution.

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[107] 1972 Draft Senate Committee Report, at 1973 Senate Hearings 53-54 (pp. 152-153 *infra*).

[108] 1974 Senate Committee Bill § 3161(h)(8) (p. 315 *infra*).

[109] 1974 Senate Committee Report 41 (p. 163 *infra*).

[110] 1974 House Committee Report 22.

[111] § 3161(h)(8)(B)(iv), added by the 1979 amendments; *see* 1979 Senate Committee Report 35 (p. 185 *infra*).

[112] Authorities cited in note 111 *supra*.

The ABA standards had recommended "absolute discharge" as the consequence of failure to meet the time limits, discharge that "should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense."[113] The commentary argued that absolute discharge was the only effective remedy—that permitting renewal of the prosecution for the same offense would make speedy trial rules "largely meaningless." The Mikva bill followed the ABA standards closely.[114] The original Ervin bill incorporated the same basic rule except that dismissal would have been required only if the failure to bring a defendant to trial in time was "through no fault" of the defendant or his counsel.[115]

The 1972 Senate subcommittee bill dropped the reference to "fault." It also extended the scope of the bar to prohibit prosecution of offenses "based on the same conduct or arising from the same criminal episode."[116] It may be noted that the increased scope was not entirely in harmony with other provisions of the bill. Throughout the development of the legislation, section 3161(h)(6) and its predecessors provided in nearly identical language for the exclusion of time between the dismissal of an indictment or information upon motion of the government and the filing of a new charge based on the same offense or an offense "required to be joined with that offense." The existence of this exclusion implies the existence of an unstated rule: that, once the time limit to trial has begun to run, it applies to both the offense charged and any offense "required to be joined" with it. By giving a broader sweep to the bar to prosecution after a dismissal on speedy trial grounds, the subcommittee bill would have barred prosecution on some charges on which the time limits had never been running. That anomaly appeared in some of the subsequent bills as well; apparently, no connection was perceived between the bundle of charges on which time limits were running and the bundle with respect to which prosecution would be barred.

The 1973 Senate hearings produced substantial criticism of the dismissal sanction on two grounds. Some critics attacked the sanction as inappropriate. As Senator McClellan put it, "the dismissal sanction is assessed against society while the fault of delay is attributable to the defendant, his counsel, the prosecutor or the court."[117] In addition, the Department of Justice criticized the scope of the bar to further prosecution and suggested that the dismissal apply only to the offense charged.[118] The 1974 Senate committee bill incorporated a compromise provision that had been suggested by Senators McClellan and Hruska.[119] Under that provision, speedy trial dismissal was to be without prejudice, but prosecution could "only be reinstituted if the court in which the original action was pending finds that the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided." As noted previously, the bill further provided that exceptional circumstances did not include general congestion of the court's docket, lack of diligent preparation, or failure to obtain available witnesses.[120]

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[113] ABA Standard 4.1.

[114] Mikva Bill § 3162(b) (p. 282 *infra*).

[115] Original Ervin Bill § 3162 (p. 290 *infra*).

[116] 1972 Senate Subcommittee Bill § 3162(a) (p. 301 *infra*).

The 1974 House subcommittee bill restored dismissal with prejudice and made the bar to prosecution applicable to "that offense or any offense based on the same conduct or arising from the same criminal episode."[121] The full Judiciary Committee dropped the phrase "or arising from the same criminal episode" and added a sentence making it clear that dismissal with prejudice would apply only to those offenses "which were known or reasonably should have been known at the time of dismissal."[122] As has been observed previously, the language that appears in the statute—allowing the dismissal to be with prejudice or without—was adopted by floor amendment as a compromise between the sponsors of the legislation and the Department of Justice. The list of matters for the court to consider in determining whether to dismiss with or without prejudice had no antecedents in earlier versions of the bill, and no substantial guidance is to be found in the history made on the House floor. References to the scope of the bar against further prosecution were also eliminated in the compromise version, and no guidance is to be found on that question. Although the 1979 amendments deferred the effective date of the sanction provision, they left the provision itself untouched, and the ambiguities of the compromise provision remain unresolved.

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[117] "Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 165 (p. 202 *infra*).

[118] Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 193 (p. 204 *infra*); Letter to Mark Gitenstein, Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Richard A. Hauser, Attorney-Advisor, Office of Criminal Justice, U.S. Department of Justice, June 12, 1973, at 1973 Senate Hearings 197-98 (pp. 206-07 *infra*).

[119] *See* 1974 Senate Committee Report 2-3 (p. 208 *infra*).

[120] 1974 Senate Committee Bill §§ 3162(a), (b) (pp. 317, 318 *infra*).

[121] 1974 House Subcommittee Bill §§ 3162(a)(1), (2) (p. 345 *infra*).

[122] 1974 House Committee Bill §§ 3162 (a)(1), (2) (p. 345 *infra*).

Conclusion

In part 2 of this volume, source materials from the legislative history of the act are organized according to the statutory language to which they pertain. Although that format has its uses, its focus on the details of individual provisions is somewhat restrictive. This part has been painted with a broader brush in an effort to convey a broader understanding of the major purposes of the legislation, the thrust of the amendments enacted in 1979, and the ways in which several major issues were dealt with in the development of the statute.

The goal of the Speedy Trial Act is a system in which cases are disposed of with reasonable dispatch, whether or not prosecutors or defendants perceive speed as being in their interest. The principal means is the imposition of statutory time limits on the court, the prosecution, and the defense, backed up by the threat of dismissal. Within that broad framework, the dominant theme of the law's development seems to have been liberalization of the definition of a "speedy trial." Between introduction of the Mikva bill in 1969 and passage of the 1974 act, the definition was liberalized by adding separate time limits from arrest to indictment and from indictment to arraignment, as well as by providing that the time to arraignment would not begin to run before the defendant's initial appearance in the charging district. In 1979, the liberalizing trend continued with statutory ratification of generous interpretations of the provisions governing the exclusion of time. As the act now stands, it appears to be a quite flexible restraint, at least in the post-indictment stage. But it remains highly technical, ambiguous in many situations, and filled with traps for the unwary.

PART 2

Section-by-Section Analysis

Introduction

[illegible]

[illegible]

SECTION-BY-SECTION ANALYSIS

18 U.S.C. § 3161(a)

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

Derivation

First appeared in original Ervin bill, § 3161(a) (p. 287). This provision required that the trial date be set at the bail hearing, after consultation with counsel, for a day certain.

1972 Senate subcommittee bill, § 3161(a) (p. 296). Changed the occasion for setting the trial date to the "earliest practicable time."

1974 Senate committee bill, § 3161(a) (p. 311). No change.

1974 House subcommittee bill, § 3161(a) (p. 336). Added the reference to a weekly or other short-term calendar and the language that follows it.

1974 House committee bill, § 3161(a) (p. 336). No change.

No House floor amendments.

1974 act, § 3161(a) (p. 375).

Not amended in 1979.

There was no similar provision in the ABA standards.

Editor's note: The 1974 House subcommittee bill added similar language about the place of trial to both this subsection and section 3161(c). For aid in the interpretation of this language, the histories of both subsections should be referred to.

Materials Addressed to Original Ervin Bill

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 80

On page 2, line 11, the bill provides that when the defendant first appears before the court for a setting of a release condition under 3146, that the judge shall then set a date certain for trial. That might be possible under the procedures of some courts. It would require modification of our procedure, and I think it would be undesirable to require this. I think that the end result would be that a fictitious date would be set and adjusted at a later time, and that is very undesirable. Every time we deal with fictions, we are making a big mistake; we ought to deal with realities.

Senator ERVIN. In other words, you think there ought to be flexibility there and not rigidity?

Judge STEPHENS. Yes. In other words, when you say the case has to come to trial within 60 days except under certain conditions, you can rely upon the court to set a date which is a fair date and within time.

The purpose, as I gather from a reading of the bill, in requiring a date certain is to enable the parties to prepare properly, and unless they have notice of when the trial is to be, of course, they cannot prepare. But we will inevitably have motions, perhaps to suppress evidence or other things of a similar kind, and in all these instances, to have a date certain already, a date certain when the very fact we are going to hear motions lets us delay that date, we are kidding ourselves, so to speak, to say that this is a firm date because we know in the beginning that it is not. So, I think that we should rely upon courts to establish rules which would be fair to both sides and enable them to prepare the case.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 252-53

That the arraignment is a preferable starting point [for imposing time limits] becomes especially apparent when section 3161(b)(1) of S. 895 is read in conjunction with section 3161(a). The latter section, as a natural corollary of the former, assumes that the defendant's trial date should be set by the judge at the initial appearance for purposes of setting conditions of release. This language fails to take into account that in most criminal cases, the initial appearance of a defendant is not before a judge, but rather before a magistrate. The magistrate cannot usually try the case nor is he necessarily aware of the trial schedule of the various judges of the court to which he is attached.

In the District of Columbia, the initial appearance of many defendants for the purposes of setting bail takes place before a judge of the District of Columbia Superior Court who performs the duties of a committing magistrate for the U.S. District Court. A Superior Court judge is not aware of the state of the trial calendar in the U.S. District Court or authorized to set trial dates for that Court. In addition, in a considerable number of cases, a defendant's initial appearance for the purposes of obtaining bail takes place in a distant district from which the defendant will eventually be removed.

The initial appearance for purposes of setting bail will take place in most cases prior to the filing of an indictment or an information. Complaints usually are only fragmentary in their recitation of the charges against a particular defendant and there is no realistic way of gauging the probable length of a trial until formal charges are filed by means of an indictment or an information. Hence, the scheduling of a particular case for a date certain without a realistic appraisal of the anticipated length of trial would lead to conflicts with other cases.

The language of section 3161(a) might also require that a single judge assume the responsibility for the calendaring of a particular court—the so-called master calendar system. Most of the federal districts have found the master calendar system to be unworkable and have adopted the individual calendar system whereby each judge is responsible for his own trial calendar. Under the provisions of this section a return to the master calendar system could be avoided only if each defendant appears initially for the purposes of setting bail before the judge who will ultimately try the case. However, such a system would entail the necessity of considerable delay before a defendant could have a hearing for the purposes of setting bail. In sum, section 3161(a) would lead to confusion and additional delay, and would make it impossible for defendants to obtain bail as speedily as possible. In our proposal we do not *require* that the court set the trial date at bail hearing or even at arraignment. We think some flexibility should be left to the court since the problems within all districts may not be the same.

Section 3161(a) would also be difficult to apply in those places where judges do not hold court continuously. Because other cases may delay the arrival of a judge who is holding court, for example, at one location, it would be a waste of time for defense counsel, government counsel, and witnesses to appear at another location, on a date certain only to find that the judge has not been able to keep the appointment. Moreover, in those cases where a defendant is to be tried jointly with co-defendants, it is impossible to set a trial date unless all defendants appear at the initial bail hearing with all of their counsel.

Counsel assigned to a defendant for the purposes of the bail hearing, in many cases, will not be the same counsel who will subsequently defend the accused. The accused may wish to retain other counsel. Without having counsel present who will actually defend, it is virtually impossible to set a trial date.

These difficulties may be avoided if the focus of the bill is shifted to the date of arraignment. The arraignment always occurs in the district where trial will be held. It frequently takes place before the judge who will try the case. At the time of arraignment all co-defendants can be brought together and counsel is usually readily ascertainable. Also at this time, of course, the grand jury or other investigation will be completed and the projected length of the actual trial will be more readily predictable.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 257

It is appropriate to mention at this point that our amendments to S. 895 have deleted the requirement that the trial be set at the bail hearing. As I mentioned above, we think it is preferable to allow the court to set the trial date at a time convenient to the court. Difficulties engendered by the arrest of a defendant in a distant district, for example, might therefore be avoided, and the length of the case more realistically appraised. It would also thus be assured that the judge who is to try the case may assign the date.

Letter to Senator Ervin from Judge W. Wallace Kent, Oct. 7, 1970, at 1971 Senate Hearings 175

In addition, the Act in the first paragraph, provides that a day certain shall be fixed for the trial. In this District we do not give a day certain. All pending cases are scheduled for the same day to avoid a situation where a case scheduled for a day certain may be disposed of at the last minute and the Court cannot conscientiously schedule another case for that time. Thus, I would suggest that the term "day certain" be eliminated from the Act in order to avoid a situation which might, in this District, unduly interfere with the scheduling and disposition of both civil and criminal cases.

Letter to Senator Ervin from Judge James T. Foley, Oct. 16, 1970, at 1971 Senate Hearings 168-69

In this 2-Judge District, . . . [w]e have a large geographical area, consisting of 29 counties in Upstate New York. It is a bustling and growing area of Upstate New York with more than 3,000,000 people in it. We sit in four cities to hold jury and trial sessions and in this manner try to service the litigants and lawyers in this widespread area. The resident Chambers of the two District Judges are 180 miles apart. With this problem of acreage and people, handled efficiently to the satisfaction of the public, lawyers and litigants in the past by the staggered and separate Sessions, it would be very difficult for the Court to follow the direction in the Bill to set a day certain for trial on the first appearance before the Court of a defendant. This is so because a Grand Jury may return indictments at a regular Court Session in Albany. Many defendants indicted may be ones who ultimately will and should be tried in one of the other cities at a future Session of Court. It will be the District Judge presiding at the Session in that other City who will have the knowledge of the Calendar condition for that Session and be able to then fix the date for trial.

Letter to Senator Ervin from Edward L. Barrett, Jr., Oct. 26, 1970, at 1971 Senate Hearings 158

In metropolitan areas, at least, release conditions will normally be set by the commissioner or magistrate and at a time when the defendant may not yet be represented. I doubt if the trial date can be set earlier than the time of formal arraignment and plea.

Letter to Senator Ervin from Laurence H. Tribe, Dec. 2, 1970, at 1971 Senate Hearings 201

Section 3161(a) appears to be limited to defendants who appear before the court for the setting of release conditions under 18 U.S.C. § 3146 (Supp. V, 1970), but § 3146 applies only to persons charged with non-capital offenses. While this section may have been broadened for the District of Columbia by the D.C. Crime Bill, those accused of capital crimes in other districts, who may be most in need of speedy trial, may not be covered by this statute as drafted. The statute should also apply to those charged with capital crimes who are dealt with under 18 U.S.C. §§ 3141 and 3148 (Supp. V, 1970).

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 47

The commentary on this provision in the draft report was virtually identical to the commentary at page 31 of the 1974 Senate committee report, set forth below.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 31

Subsection 3161(a) requires the judge at the earliest practicable point in the process to set a date certain for trial. The date is set upon consultation with the prosecutor and defense counsel.

This provision requires that all parties must be on notice of the trial date as early in the proceeding as possible. Setting a trial date early in the process permits the parties, the witness,* and especially the courts, to plan out the trial schedule and to integrate the schedule with their other obligations. This eliminates difficulties with subsequent scheduling conflicts of the attorneys, especially those defense counsel who may have a civil practice. Any conflict existing at this time can be resolved and no future conflicts can be permitted to defer the trial date, since the attorney is already on notice as to his primary obligation to prepare and try this particular case.

S. 895 required that the date certain be set at initial appearance rather than at the earliest practicable point. The Justice Department and several other witnesses suggested that setting a date certain at initial appearance was unworkable because United States magistrates, who conduct initial appearance procedures in many districts, would be setting the date for a trial to be conducted by a district court judge. Based upon Judge Albert Stephens' suggestion, the requirement has been eliminated so that the Federal district judges can retain control over their own calendars. S. 754 would still provide that the court set a date certain for trial at the earliest possible point in the process. Thus, the courts would be free to adopt rules on this subject consistent with their own peculiar needs and capabilities.

Prepared Statement of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 178

Subsection 3161(a) requires that courts set a "day certain" for the trial of each defendant. A requirement such as this would be most oppressive from the standpoint of judicial administration. While there are indeed situations where criminal cases are and should be set for trial on a day certain, many criminal cases are set down on a weekly calendar to be tried as reached on that calendar. If district courts were no longer permitted to calendar cases in this manner, last minute changes in plea would eventually disrupt the orderly processing of both criminal and civil litigation and lead to calendar breakdowns.

Furthermore, such a requirement could have a substantial impact on the efficient administration of the jury system. Calendar breakdowns are costly both in terms of wasted time of jurors and the payment of fees on days on which jurors are called to serve when there is no case to try because of last minute changes of plea.

This problem could be alleviated by an amendment to the subsection to permit the calendaring of criminal trials on short term trial calendars. See also the letter from Chief Judge W. Wallace Kent to Senator Ervin appearing on page 175 of the Senate hearings on S. 895 of the 92nd Congress.

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*So in original. Probably should be plural.

Testimony of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 185

Mr. CONYERS. Director Kirks, wasn't this language "at the earliest practicable time" in itself a modification of some original language that preceded it—namely, that originally there was a requirement that the trial date be set at the initial appearance—and for what largely sounds like the same reasons that you recite here today, the language was changed in 3161(a) to "at the earliest practical time"?

Doesn't that leave you, even with that modified language, the kind of flexibility you would recommend?

Mr. KIRKS. May I refer to the bill, please?

Mr. CONYERS. Sure.

Mr. KIRKS. I think we are concerned about the last phrase in paragraph (a), Mr. Chairman. The whole paragraph, which is quite brief, reads:

> In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set a day certain for trial.

We are suggesting that this last phrase should be tempered to embrace further flexibility of having a time, a short calendar period such as a week. If a court and all concerned are afforded that much flexibility, then we could avoid what happens even where in the present system we have flexibility, we have abuses of getting almost set for trial, getting everyone present just as you referred to, I think, in the opening of these hearings with Senator Ervin, and then the key participant in the whole proceedings not being present.

The single most expensive item in the Federal judicial budget is the payment of jurors. That is an item over some $18 million. We are making significant strides in the improvement in jury management. One of the capabilities that we have in the present system—and we are suggesting for your consideration the desirability of preserving some flexibility in the actual fixing of the day certain for trial, not statutorily, but by cooperation of all of the parties concerned—we will continue to make a significant financial savings in the calling of jurors alone. Under the programs we have instituted in the past few years, we have concrete evidence we are saving over a half million dollars annually as a result of better jury management.

This provision, of course, is designed to preserve money for the cost of jurors, but I am suggesting that is a valid consideration in preserving some flexibility.

Another significant feature, Mr. Chairman, is this. Under the present prevailing practice, judges are working on individual calendars today. They are not working under a master calendar system, and that means that every time a case is filed, it is assigned to a specific judge and he handles that case from beginning to end, criminal and civil. And in order for him to be an efficient manager of his personal calendar of cases, both civil and criminal, he needs some flexibility.

Comment by Representative Ray Thornton During Testimony of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 191

Mr. THORNTON. I am impressed by your suggestion about the calendar, because setting a day certain is potentially wasteful of time, and if it is possible to calendar a series of cases, beginning at the first of the week with the intention of completing those cases in a week, it appears that is a useful suggestion.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 198

On page 2, at the line 7, amend section 3161(a) by deleting the period at the end of the sentence, and by adding the following language:

> "At such place, within the judicial district, so as to insure a speedy trial."

Comments

Presently 60% of the 94 judicial districts do not have statutory divisions, but merely have statutory places designated for the holding of court. If speedy trials are to become a reality, there needs to be no impediment, real or imaginary, in the court's authority to hold a trial at any place within the district that will insure a speedy trial. There are no constitutional or statutory barriers to the above proposed language, but there are still some problems in districts having statutory divisions, in the setting of trials outside of the division of the offense, although the former provisions of Rule 18, F.R.Crim.Proc., requiring trial "in a division in which the offense was committed" was [*sic*] deleted from the rule in 1966 at which time former Rule 19, F.R.Crim.Proc., was also rescinded which, prior thereto, had required that arraignment, plea and sentence be conducted in the division of the offense.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 202-03

At page 25, between lines 9 and 10, amend Title I by adding after section 3171, new sections 3172 and 3173 to read as follows:

. . . .

> "§ 3173. *Place of prosecution and trial*
>
> "Except as otherwise permitted by statute, the prosecution shall be had in a district in which the offense was committed. The court, in its discretion, shall fix the place of trial at such place within the district as will assure a speedy trial of the offense."

With the exception of apparent typographical errors, the "comments" on this proposed new section were identical to those on the amendment to section 3161(a) immediately above.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 203

The department proposed the following new section to be added to title I of the bill:

SEC. 104. Rule 18, Federal Rules of Criminal Procedure of Title 18, United States Code, being in conflict with the provisions of the foregoing section 3173, is hereby rescinded and repealed.

Comments

See comment under section 3173.

Testimony of H. M. Ray, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 219

We would also propose that in 3161(a) you provide that the court could try the case within the judicial district so as to insure a speedy trial to eliminate this idea the defendant has the automatic right to be tried——*

"Miscellaneous Amendments," Enclosure to Letter to Representative Conyers from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Oct. 1, 1974, at 1974 House Hearings 756

(1) That line 7 on page 2 of the bill be amended to read as follows: ". . . . the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar." †

Reason.—Setting a case for trial on a "day certain," except for unusual situations, is contrary to all rules of good judicial administration. Cases normally should be calendared for trial and reached in order on the calendar.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 28-29

Section 3161(a) provides that the judge shall set the date for trial at the earliest practicable point in the proceedings upon consultation with the attorney for the Government and counsel for the defense. The purpose of this provision is to put all participants in the criminal process on notice that the trial will commence not later than 60 days after arraignment. This would allow witnesses for both the defense and the Government to know well in advance when they are required to appear in the proceedings. Also, it would allow the courts to more efficiently administer their dockets. When a trial is scheduled on a day certain, the court could be left without a case to try because of a last-minute guilty plea prior to the commencement of trial. This would be a waste of judicial resources.

When a case is set down for trial on a particular day or week under the speedy trial provisions, the time scheduled for trial is more than just a target date; it is a strong admonition to all parties to plan their schedules accordingly so that delay based on the unavailability of witnesses, inadequate preparation, and scheduling conflicts due to other commitments will not jeopardize the disposition of the case which could be detrimental to the interests of the defendant, the Government, or society. Section 3161(h)(8)(C) expressly provides that general court congestion, lack of diligent preparation and unavailability of witnesses are not proper grounds for granting a continuance.

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*Mr. Ray was cut off by a question on another subject, and did not return to this issue.

†Ellipsis in original.

At the suggestion of the Administrative Office of the United States Courts, the Subcommittee adopted an amendment that would permit the scheduling of cases on a weekly or short-term trial calendar. This provision is not* intended to ameliorate the original mandate of the legislation which provides that the case be scheduled for a day certain. The courts, by the addition of the new language, would be permitted the flexibility of using either approach to scheduling cases as long as the original intent of the section as originally drafted is not overlooked—which is to insure that defense counsel, witnesses and the attorney for the Government are not forced to spend unreasonable lengths of time waiting for the calling of their case for trial. The Committee recognizes that a balance must be struck between efficient court management and convenience to the participants in the proceeding. It believes that the district courts under this provision could schedule cases by using one such scheduling alternative—either a day certain or weekly or short-term calendars.

The words "short-term calendar" are not intended to mean a period of duration of more than one week, although it may be a period of less than a week.

At the request of the Justice Department, the subcommittee adopted an amendment which would permit the trial of a case at any place within the judicial district. This language was included in anticipation of problems which might occur in districts with statutory divisions, where it could be difficult to set trial outside the division. The Department, in its comments concerning this provision, pointed out that "no constitutional or statutory barriers" exist to the addition of this language.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41780-81

Mr. ALEXANDER. Mr. Chairman, I thank the gentleman for yielding. I take this time to ask the gentleman a question.

My concern is based upon the provisions of the bill that require that an information or indictment must be filed within 30 days after arrest or that charges against the defendant may not later be brought, and the further provision that the trial must be held within 60 days after arraignment or indictment or the defendant must be released.

I am familiar with Federal courts where there is only one judge, and extraordinary time requirements ensue as a result of unusual cases, like the bakery conspiracy cases in 1960's, or a protracted patent or copyright case that might require weeks for trial, or, as we have seen recently, the Dakota trials of the Indian insurrection, or a Watergate type trial.

My question is, are there exceptions to these time limits which take into consideration the extraordinary time required for litigation of cases that require protracted trials in one-judge courts?

Mr. CONYERS. The gentleman raises a very pertinent point, and this legislation was amended in subcommittee by the gentleman from Maine (Mr. COHEN) to recognize the special problems that exist in rural districts. For those jurisdictions where grand juries sit infrequently because of the small number of criminal case filings as the case may be in rural areas, we added a provision that would extend the time period for filing an indictment up to 30 days where no grand jury has been in session following the arrest of a defendant to the running of the time limit between indictment and trial.* Additionally, a provision was included to allow the court to schedule trial at any place within the judicial district to insure that the defendant receives a speedy trial in large geographic districts in which judges are required to travel from division to division.

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*So in original. The word "not" is apparently an error.

Mr. ALEXANDER. I thank the gentleman, but I am still concerned that additional consideration of this point is needed.

18 U.S.C. §§ 3161(b), (c)

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

Derivation

Mikva bill, § 3161(a)(1) (p. 280). This provision mandated a single time limit to commencement of trial, running from "the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed earlier, from the date of such filing." The time limit was 60 days if the defendant was charged with a crime of violence, 120 days otherwise. There was no minimum period within which trial could not commence.

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*So in original. The time limit under discussion was the limit between arrest and indictment.

Original Ervin bill, § 3161(b)(1) (p. 287). Eliminated "earlier" from the reference to the filing of an information or indictment and made the time limit 60 days for all defendants.

1972 Senate subcommittee bill, § 3161(b)(1)(A) (p. 296). Made the 60-day time limit run from the date of arrest or service (rather than issuance) of a summons or, if earlier, from the filing date (and making public) of an information or indictment.

1974 Senate committee bill, §§ 3161(b), (c) (p. 311). Introduced the separate 30-day time limit for the filing of an information or indictment and made the 60-day time limit to trial run from the date an information or indictment is filed (and made public). The new subsection (b) was identical to the first sentence of the final version.

1974 House subcommittee bill, §§ 3161(b), (c) (pp. 336, 337). Added the second sentence of subsection (b), but with a clause forbidding detention in excess of 30 days of individuals awaiting indictment. Introduced a separate 10-day time limit for arraignment in subsection (c), to run from "the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs." Required that the defendant "be tried" within 60 days from arraignment "at such place, within the district, as fixed by the appropriate judicial officer."

1974 House committee bill, §§ 3161(b), (c) (pp. 336, 337). Eliminated the time limit on detention from subsection (b); changed the requirement that the defendant "be tried" within 60 days to a requirement that the trial commence within 60 days.

No House floor amendments.

1974 act, §§ 3161(b), (c) (p. 375).

Subsection (c) was amended in 1979 by adding section 3161(c)(2) and reenacting the former subsection, with amendments, as section 3161(c)(1). The House accepted the Senate provision without change. The amendments merged the separate time limits for arraignment and commencement of trial into a single 70-day time limit to trial, eliminated the reference to place of trial, and added the sentence about consent to trial on a complaint.

ABA standard 2.2(a) provided for a single time limit to commencement of trial from the date a defendant was "continuously held in custody or on bail or recognizance . . . to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode" or, if earlier, from the date an indictment, information, or other charge sufficient to support a prosecution is filed.

Editor's note: The 1974 House subcommittee bill added similar language about the place of trial to both section 3161(a) and section 3161(c). Although the language was dropped from section 3161(c) in the 1979 reenactment, it remains in section 3161(a).

Materials Addressed to Mikva Bill

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 172

I fail to see the reason for the difference between a trial commencing within 120 days for one type of offense and 60 days for a crime of violence. Presumably the defendant charged with a crime of violence may be in custody, but would it not be better to distinguish between "in custody" and "not in custody" defendants?

Materials Addressed to Original Ervin Bill

Letter to Other Senators from Senator Ervin, July 8, 1970, at 1971 Senate Hearings 158

S. 3936 is designed to make effective the Sixth Amendment right to a speedy trial in Federal criminal cases and to assure the effective application of the law to those guilty of crime. It requires each Federal District Court to establish plans for implementation of the bill's objective of setting trials within 60 days of the date of an indictment or information.

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35

In Section 3161(b)(1), for purposes of clarification, the words "the prosecution is initiated by filing" should be inserted after the word "if" and the words "is filed" should be omitted. This would make clear that trial must be commenced 60 days after institution of prosecution, whether prosecution is instituted by arrest, summons, original information, or original indictment; filing of an information or indictment subsequent to arrest should not extend the 60 day period.

Testimony of Bernice Just, 1971 Senate Hearings 88, 91-92

The provision beginning on line 15 of page 2 extends the trial commencement date to a limit of 60 days from the filing of an indictment. This extension could easily result in a minimum pretrial detention of 6 months following arrest, and very likely even longer. Though I do not have documentation, it is my impression that a time lapse of 3 or 4 months between preliminary hearing and indictment is normal, and additional lapses up to 6 months are not uncommon. Perhaps there should be a time limit for returning an indictment after arrest. . . .

. . . .

Mr. Baskir. I was interested in your point with respect to delay in indictments. I understand from somebody in the U.S. Attorney's Office here that in new cases it takes something like an average of 72 days to go to an indictment, and then after that something like 28 days to go from indictment to trial. Some suggestions have been made that there needs to be some time limit for securing indictments. If the figures are correct, perhaps this is true.

Mrs. Just. I believe that those figures are reasonably accurate in the District of Columbia Superior Court. I do not believe it is any better in the U.S. District Court. The long delays are still occurring there also.

Mr. Baskir. That is just getting to indictment, before you get to the process of preparing defense and prosecution.

Mrs. Just. Correct.

"Additional Amendments to S. 895," Appendix A to Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 147

*1. On page 2, line 14:**

Change "or a summons is issued" to "or served with a summons."

Comment.—Time limits should ordinarily run from the date the defendant receives notice of his criminal charge, e.g. by arrest or summons, instead of from some earlier time when the law enforcement authority privately decides (without the defendant's knowledge) to act, e.g. by obtaining issuance of an arrest warrant or summons.

2. On page 2, line 16:

Add after "filed" the words "prior to arrest or summons, and made public."

Comment.—Without this change, a defendant who is arrested or summonsed on a charge, and is two weeks *thereafter* indicted on the same charge (e.g. arrested in the act of car theft, and thereafter indicted on that charge), would have his time limit prolonged by two weeks for no justifiable reason. An indictment or information should commence the running of the limit only if it precedes arrest (or summons), is known to the defendant, his whereabouts are known to the authorities, and he remains fully amenable to service.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 251-53

[W]e believe that the provisions for the measuring of the time limitation, contained in section 3161(b)(1) of S. 895, are undesirable insofar as they fix the point from which the time limit begins to run. While the present language is susceptible of various interpretations, we understand the provision to mean that trial must commence 60 days from the defendant's arrest or 60 days from the day a summons for the defendant's appearance is issued. The section appears to assume that in cases where an indictment has been returned prior to arrest or issuance of summons, the time runs from the date of the filing of the indictment or information.

One practical effect of this provision would be to discourage the issuance of summons in cases where the defendant's minimal danger and the unlikelihood of flight would otherwise make this procedure preferable to the issuance of an arrest warrant, or to an arrest without warrant on probable cause. While it is true that many federal prosecutions are begun after completion of grand jury activities, a substantial number of cases, if not the majority, are commenced with arrest which is then followed by the grand jury investigation. In our opinion, section 3161(b)(1) of S. 895 takes insufficient account of these cases.

In many federal districts a period in excess of 60 days is presently needed for the return of an indictment. A sufficient time span is needed for an initial interview of witnesses, their appearance before the grand jury, the recording of the presentment, the final drafting of the indictment, the vote of the grand jury on the indictment and its return in open court. While the time consumed by these preliminaries can hopefully be shortened, it is problematical whether a 60-day period or even a 180-day period would yield optimum results. In certain cases, such as fraud cases or conspiracies, prosecution may very well be commenced with arrest but an extended grand jury investigation is necessary before an indictment can be returned. Such a grand jury investigation alone may very well require a period in excess of 60 days. Other delays in grand jury investigations can be caused by reluctant witnesses who refuse to cooperate, and whose contempt citations must be litigated before the grand jury can conclude its deliberations. These delaying factors are not attributable to either the defendant or the Government.

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*So in original. Reference should probably be to line 15.

Section 3161(b)(1) also does not sufficiently take into account the fact that in some districts, grand juries meet only on an intermittent basis. The proposed legislation would require that a grand jury should be in continuous session. Since, in many districts, there is no necessity for a continuously sitting grand jury, such a practice would entail a considerable waste of time and money. Nor does the provision take into account that even though a grand jury may be available which votes on an indictment within the specified period of time, a judge may not be available before whom the grand jury can return its indictment. Under those circumstances, and in the absence of a judge, the grand jury could not return its indictment and the indictment could not be filed within the required time period.

Section 3161(b)(1) also fails to take into account the relative ease with which pleas of guilty may be withdrawn prior to sentence. In view of this fact, it is present practice not to dismiss counts to which no pleas are entered until after sentencing on the plea. Under section 3161(b)(1) a defendant could enter a plea of guilty on the 59th day after his arrest but because the preparation of a presentence report may take approximately four weeks, should he subsequently change his mind and withdraw his plea of guilty there would be no possibility of prosecuting him on other counts which may not yet have been dismissed. Indeed, the proposed language makes it doubtful that after the expiration of the 60-day time period a defendant could even be prosecuted with respect to the charge to which he pleaded guilty but subsequently withdrew his plea of guilty.

This problem becomes especially acute in situations where the plea of guilty is entered pursuant to Rule 20 of the Federal Rules of Criminal Procedure. In such cases, should the defendant change his mind and withdraw his plea of guilty, he would have to be transferred to another district for trial. Obviously, this process could not be accomplished within the time period specified. Similarly, a transfer of a case for the convenience of the parties pursuant to Rule 21(b), is difficult to accomplish within 60 days of arrest.

We propose that the point from which the time period begins to run be the date of the defendant's arraignment. This would obviate difficulties with respect to grand jury investigations, the issuance of summonses, pleas of guilty, and transfers under Rule 21(b), F.R. Crim. P. We believe that the present test of Rule 48, F.R. Crim. P. is sufficient to provide an incentive for the speedy return of an indictment or information.

That the arraignment is a preferable starting point becomes especially apparent when section 3161(b)(1) of S. 895 is read in conjunction with section 3161(a). The latter section, as a natural corollary of the former, assumes that the defendant's trial date should be set by the judge at the initial appearance for purposes of setting conditions of release. This language fails to take into account that in most criminal cases, the initial appearance of a defendant is not before a judge, but rather before a magistrate. The magistrate cannot usually try the case nor is he necessarily aware of the trial schedule of the various judges of the court to which he is attached.

In the District of Columbia, the initial appearance of many defendants for the purposes of setting bail takes place before a judge of the District of Columbia Superior Court who performs the duties of a committing magistrate for the U.S. District Court. A Superior Court judge is not aware of the state of the trial calendar in the U.S. District Court or authorized to set trial dates for that Court. In addition, in a considerable number of cases, a defendant's initial appearance for the purposes of obtaining bail takes place in a distant district from which the defendant will eventually be removed.

The initial appearance for purposes of setting bail will take place in most cases prior to the filing of an indictment or an information. Complaints usually are only fragmentary in their recitation of the charges against a particular defendant and there is no realistic way of gauging the probable length of a trial until formal charges are filed by means of an indictment or an information. Hence, the scheduling of a particular case for a date certain without a realistic appraisal of the anticipated length of trial would lead to conflicts with other cases.

The language of section 3161(a) might also require that a single judge assume the responsibility for the calendaring of a particular court—the so-called master calendar system. Most of the federal districts have found the master calendar system to be unworkable and have adopted the individual calendar system whereby each judge is responsible for his own trial calendar. Under the provisions of this section a return to the master calendar system could be avoided only if each defendant appears initially for the purposes of setting bail before the judge who will ultimately try the case. However, such a system would entail the necessity of considerable delay before a defendant could have a hearing for the purposes of setting bail. In sum, section 3161(a) would lead to confusion and additional delay, and would make it impossible for defendants to obtain bail as speedily as possible. In our proposal we do not *require* that the court set the trial date at bail hearing or even at arraignment. We think some flexibility should be left to the court since the problems within all districts may not be the same.

Section 3161(a) would also be difficult to apply in those places where judges do not hold court continuously. Because other cases may delay the arrival of a judge who is holding court, for example, at one location, it would be a waste of time for defense counsel, government counsel, and witnesses to appear at another location, on a date certain only to find that the judge has not been able to keep the appointment. Moreover, in those cases where a defendant is to be tried jointly with co-defendants, it is impossible to set a trial date unless all defendants appear at the initial bail hearing with all of their counsel.

Counsel assigned to a defendant for the purposes of the bail hearing, in many cases, will not be the same counsel who will subsequently defend the accused. The accused may wish to retain other counsel. Without having counsel present who will actually defend, it is virtually impossible to set a trial date.

These difficulties may be avoided if the focus of the bill is shifted to the date of arraignment. The arraignment always occurs in the district where trial will be held. It frequently takes place before the judge who will try the case. At the time of arraignment all co-defendants can be brought together and counsel is usually readily ascertainable. Also at this time, of course, the grand jury or other investigation will be completed and the projected length of the actual trial will be more readily predictable.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261

[§ 3161](c) The trial of a defendant charged with an offense under the United States Code shall be commenced within 180 days from the date of arraignment, subject to the provisions of section 3162 of this title.*

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 257

Section 3161(c) provides that the trial shall be commenced within 180 days of the date of arraignment of the defendant. We have mentioned above the reasons that we think the arraignment date is the preferable commencement of the time period and also why a 180-day period is necessary.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3163](e) If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the court, or in arraigning a defendant after filing of the information or indictment, the court may dismiss the indictment, information or complaint.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 259

In choosing the arraignment date as the commencement of the 180-day time period, we have added a provision, section 3163(e), which allows the court to dismiss the charges against a defendant if there is unnecessary delay in *presenting* the charge to the grand jury, filing of an information, or in arraigning the defendant. This restates the provisions of present Rule 48, F.R. Cr.P., adding to it the dismissal sanction if there is unnecessary delay in arraigning the defendant. This will require the Government to meet its obligation to promptly seek formal charges and also to seek prompt arraignment thereafter.

Letter to Senator Ervin from Judge George L. Hart, Jr., June 22, 1970, at 1971 Senate Hearings 170

This Section provides the initial point for the running of the 60-day period with the filing of the information or indictment. I would suggest that you might well consider changing the beginning period to the date of arraignment.

Again, I can only give you our experience in this jurisdiction. We used to set arraignments within 1 week of the return of an indictment but we were forced to extend this period to 2 weeks because we found it was impracticable to obtain an affidavit of poverty, appoint counsel and have appointed counsel interview his client and hold the arraignment within 1 week. Even with the 2 week period between indictment and arraignment we are constantly faced with appointed counsel requesting relief from appointment and the appointment of other counsel because of commitments previously made by the first counsel appointed. Also, we frequently find that at arraignment where we have appointed counsel, the defendant will state that his family is going to hire retained counsel for him and we are forced to continue the arraignment from 1 to 3 weeks in order for him to obtain this retained counsel or, upon failure to obtain retained counsel within the limited period, to obtain appointed counsel and arraign the defendant. I realize that to set the starting date of the period at arraignment would make it possible for a Court to abuse this provision by simply delaying arraignment without cause but I do not feel that any Federal Courts would be likely to so abuse such a provision.

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*Section 3162 in the department's proposal provided for "exclusions and exceptions."

Letter to Senator Ervin from Edward L. Barrett, Jr., Oct. 26, 1970, at 1971 Senate Hearings 159

Making the time run from the date of arrest may impose insoluble problems for many districts. In Wyoming, *e.g.*, the grand jury meets only once a year. By refusing to waive indictment the defendant could force either the burdensome procedure of convening a special grand jury just for his case or else a dismissal for failure to bring to trial within 60 days. The only real solution to this problem is a constitutional amendment eliminating the requirement of grand jury indictment so that preliminary hearing can be held promptly in its place. An interim solution (of doubtful constitutionality) might be to provide that in those districts where it is deemed impracticable to have grand juries meet as often as bi-weekly the defendant must waive indictment in order to have the right to trial within 60 days.

I have a technical problem with this subdivision. Shouldn't it say the summons is "served" instead of "issued"—as a parallel to arrest on a warrant. Also I doubt if we really want to make the 60 day period run from the filing of an indictment or information when the defendant has not previously been arrested—there may be many legitimate reasons why the arrest or service of summons will take time to effectuate.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 178

Section 3161(a) would apply the provisions of the bill on the basis of the date the defendant "first appears before the court". I suggest the government could avoid the intent of this bill—i.e., assuring a defendant a speedy trial—by delaying the return of an indictment or the issuance of a warrant. Accordingly, some thought should be given to precluding delays in the return of indictments or issuance of initial arrest warrants where all of the facts involving a particular defendant and case are known to the prosecutor. I strongly believe that delays in the charging process are as undesired, if not more inherently evil and damaging, than delays after a defendant has been properly notified of the charges against him and obtained the services of an attorney who in turn can assert the speedy trial right.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 179

As also observed in another context I do not believe the present bill addresses itself to what I consider the most prevalent abuse related to the delay of criminal cases—i.e., delay in returning indictment or initiating charges. In making this observation I am willing to acknowledge that these delays are many times caused by under-staffed and overworked prosecutorial offices. On the other hand these delays, as well as possible delays in the appellate procedure, might well be considered a proper subject for consideration by this same piece of legislation. Relative to pre-indictment or charging delay I might generally suggest that where the prosecutorial office waits over six months to initiate charges on an investigation which it has completed, the office be required to state in writing to the court and defendant the reasons and an explanation for the delay.

Letter to Senator Ervin from Barbara Allen Bowman, Nov. 30, 1970, at 1971 Senate Hearings 163

I am troubled by 3161(b)(1) which allows the sixty days to be tolled by the filing of an indictment or information. In the District of Columbia, a month or more is common between arrest and indictment. If the date from which the sixty days are fixed is to be that of indictment, there should be included a speedy indictment requirement of no more than two weeks from the date of arrest.

Letter to Senator Ervin from Laurence H. Tribe, Dec. 2, 1970, at 1971 Senate Hearings 200-01

[A]s presently drafted, Title I may allow law enforcement officials to circumvent its carefully drawn time limit by delaying either arrest or indictment. If an indictment is filed, trial must be set for sixty days from such filing, rather than from the date of summons or arrest. It is possible that if the prosecution indicates that an indictment will be filed, but then delays filing it for an extended period of time, the trial date need only be set within sixty days from such filing. The result may be to encourage delayed indictments, and undermine the statute's effectiveness. This problem could be avoided by setting the time within which trial must be held from the date of arrest or summons, including in that time a reasonable duration for the filing of an indictment. For example, the Crime Commission's suggestion of four months between arrest and trial would allow time both for the filing of an indictment and for the preparation for trial. But even under that standard, arrest may simply be delayed, thereby delaying the actual time within which the trial must be held. To avoid this difficulty, it may be necessary to add a provision to the effect that if arrest is unnecessarily delayed for the purpose of circumventing the provisions of the Act, trial must still be scheduled within a given time from the date when arrest would otherwise have occurred. The enforcement problems connected with any such standard, however, are obvious.

Letter to Senator Ervin from Judge Albert Lee Stephens, Jr., Mar. 4, 1971, at 1971 Senate Hearings 198

May I respectfully suggest a basic modification which I believe will be perfectly in line with your purpose. The 60-day time element which you have in mind would better run from the date of arraignment rather than the date of indictment or information. Many indictments are brought against people whose whereabouts are entirely unknown and long periods may elapse before they are apprehended. Once in custody, the law already provides for prompt appearance before a magistrate and prompt arraignment before the court. It is from this point forward that undue delays sometimes occur.

Editor's Note

Material related to a suggested provision about computation of periods of time is reproduced as part of the history of section 3172.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 48

The first subparagraph, 3161(b)(1)(A) retains the operative language from 3161(b)(1) requiring trial within 60 days of arrest. The provision has been altered so that where a defendant is notified of a criminal charge by summons, the period begins with receipt of the summons rather than upon its issuance. This change is designed to remedy the problem of a summons being issued but not served for a number of days.

In another change in this section, prompted by comments from Professor Dan Freed and former U.S. Attorney Dan Rezneck, the language of 3161(b)(1) has been altered by subparagraph (A) to clarify that trial is to be commenced 60 days after institution of prosecution, whether prosecution is instituted by arrest, summons, original information or original indictment, and that filing of an information or indictment subsequent to arrest does not extend the 60-day period.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 166

(b) In the case of an individual against whom a complaint is filed charging such individual with an offense, no information or indictment shall be filed on the basis of the charge contained in that complaint after the expiration of a sixty-day period following the date on which such individual was arrested or served with a summons in connection with such charge; except that the court may extend such sixty-day period for a reasonable time, not in excess of   days, if the unavailability of witnesses or other factors resulting from the passage of time shall make such sixty-day requirement impracticable.

(c) The trial of a defendant charged in an information or indictment with the commission of an offense shall be commenced within sixty days from the date on which the information or indictment containing such charge is filed (and made public).

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 164

Under S. 754, as now drafted, the sixty day time period runs from date of arrest or summons [§ 3161(b)(1)].*

This amendment would distinguish between arrests made following an indictment or information from [*sic*] arrests made either with or without a warrant for crime prevention purposes or in connection with the course of an investigation.

It can be argued that this distinction is necessary to give recognition to the need for adequate law enforcement preparation of its case prior to the decision to prosecute, which takes place at the time of charge, not arrest.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 192

The following comments, although written after subcommittee approval of the bill, were apparently based on a draft submitted to the Justice Department beforehand:

Section 3161(b)(1)(A) provides that the sixty-day time limit begins to run "from the day that the defendant is arrested or served with a summons except that if the prosecution is initiated by filing an information or indictment prior to arrest or summons (and made public) . . . from the date of such filing." † Because of the problems which can arise from extensive grand jury investigations after arrest, the times and places of arrest in multiple defendant cases, the availability of a grand jury in some rural districts, proceedings under Rules 2‡ and 40, *F.R. Crim. P.*, and transfers pursuant to Rule 21(b), *F.R. Crim. P.*, the only orderly starting point for the computation of time limits, in the Department's view, is the date of arraignment. The many complications which would result if the computation is commenced at any other starting point were fully discussed in our letter of October 19, 1971. For the reasons therein stated, we believe it to be essential that the computation of time limits begin from the date of arraignment.

Moreover, selection of arraignment as the starting point will not lead to unnecessary delay since the Court has authority under existing law to dismiss a case if there is unnecessary delay in presenting a charge to a grand jury or in filing an information against the defendant who has been held to answer to the district court. See Rule 48(b), *F.R. Crim. P.* All other cases would be subject to the appropriate Statute of Limitations.

It should also be noted that the Model Plan drafted by the Committee on the Administration of the Criminal Law of the Judicial Conference for the implementation of new Rule 50(b), *F.R. Crim. P.* designates the date of arraignment as the beginning point for the computation of time for the trial of criminal cases.

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*Brackets in original.

†Ellipsis in original.

‡So in original. Probably should be "20."

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 115

In certain cases, a prosecution commenced by arrest may be followed by extended grand jury proceedings before an indictment is returned. Such a grand jury investigation alone may require more than 60 days.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 118

Mr. BASKIR. If the bill were amended so that, let us say, there would be one time limit between arrest and indictment and another time limit between indictment and the beginning of trial, leaving aside for the moment what that time limit is, with a sanction for dismissal if either of those time limits were not met, would the Department's concern be substantially eased?

Mr. SNEED. Well, it would be eased. Whether substantially or not, depends on what they are. That type of step and the Rehnquist suggestions to which you refer, are steps in the direction we think this bill ought to go. Now, whether a particular measure that the subcommittee produces will be entirely suitable to us depends on what that really is. We would have to see it first. But you are moving in the right direction.

Discussion of Proposed Amendments in Statement Submitted for the Record by Daniel J. Freed, 1973 Senate Hearings 154, 157

Divisible time limits.—A subdivided set of time limits, based on three successive stages in a criminal prosecution, to replace the single limit now found in proposed Section 3161 of S. 754. This would take account of the substantial time variations commonly found in the inception (by arrest or indictment) and in the conclusion (by acquittal or conviction) of criminal cases. It separates (i) arrest to indictment (ii) indictment to the beginning of trial, and (iii) the end of trial to sentencing. This revision combines suggestions from a variety of sources, including Senator McClellan, the Department of Justice and Federal Rule 50(b).

. . . .

. . . Amendment #2 proposes that the single time limit in Section 3161 of S. 754—covering arrest or indictment until trial—be replaced by three separate limits: (a) arrest to indictment, (b) indictment to trial and (c) conviction to sentence.

Specifically, under these amendments [relating to phasing in and dividing the time limits], the initial and ultimate time limits would be as follows:

I(i). They would not be operative at all during the first year after enactment, under the effective date provision in Section 3163, except for the interim limits defined in Section 3164, which would remain unchanged.

I(ii). They would prescribe for the period from *arrest to indictment*
- (a) 60 days in year 2.
- (b) 45 days in years 3 and 4.
- (c) 30 days beginning in year 5.

I(iii). They would prescribe for the period from *indictment to trial*
- (a) 180 days in year 2.
- (b) 120 days in years 3 and 4.
- (c) 60 days beginning in year 5.

I(iv). They would prescribe for the period from *conviction to sentencing*
- (a) 45 days in year 2.

(b) 30 days in years 3 and 4.
(c) 21 days beginning in year 5.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 2

SEGMENTED TIME LIMITS.—As introduced, S. 754 provided a single 60-day time limit between arrest or return of indictment and commencement of trial. The committee has amended Section 3161 to establish two separate sets of time limits, one between arrest and indictment and one between indictment and commencement of trial. The arrest-to-indictment time limit would eventually be 30 days and the indictment-to-trial time limit would eventually be 60 days.

1974 Senate Committee Report 25-26

Subsection 3161(b) sets a 30-day limit on the period between the filing of a complaint or an arrest and the filing of an information or indictment based on the complaint or arrest. Informations or indictments could not be brought after the 30-day limit. The time limit imposed by this subsection is subject to the allowable delays as set forth in Subsection 3161(h).

Subsection 3161(c) requires that trial must commence within 60 days of the date of the filing of an indictment or information. Combined with the 30-day arrest to indictment time limit imposed by subsection 3161(b), the total period between arrest and trial allowed by S. 754 would be 90 days.

1974 Senate Committee Report 31-33

Subsection 3161(b) sets a 30-day limit on the period between the filing of a complaint or an arrest and the filing of an information or indictment based on the complaint. If cases are not brought within this period they must be dismissed. The time limit imposed by this subsection is subject to the allowable delays as set forth in Subsection 3161(h).

Subsection 3161(c) requires that trial must commence within 60 days of the date of the filing of an indictment or information. Combined with the 30-day arrest to indictment time limit imposed by subsection 3161(b), the total period between arrest and trial allowed by S. 754 would be 90 days.

The Committee is convinced that the goal of trial within three months of arrest in the typical Federal criminal case is a reasonable one. The Subcommittee on Constitutional Rights heard considerable testimony from prominent members of the bench and bar on the reasonableness of such a time limit.

. . . .

However, the Justice Department objected to the original provisions of S. 754 which provided a single time limit of 60 days between arrest and commencement of trial. According to the Department the grand jury process should not be covered in the speedy trial time limits. The Department is worried that in complicated cases, such as conspiracies in which arrest precedes indictment, prosecution cannot be adequately prepared in a two-month period. Furthermore, in approximately 40 percent of the Federal criminal cases, arrests are made before indictment for the purpose of halting on-going criminal activity. Thus, the Department of Justice proposed commencing the speedy trial time limits with arraignment.

However, a study by the Federal Judicial Center found that over one-half of the delay in an average Federal case occurs between arrest and indictment and that delays of approximately 100 days during this period are typical. In light of these findings it seemed inadvisable to adopt the Department's proposal, commencing the time limits with arraignment and thus excluding the period between arrest and indictment from the legislation.

Senator McClellan suggested a workable compromise on this question. He proposed that there be two different time limits, one between arrest and indictment where arrest precedes indictment and one between indictment and trial in all cases. The Committee has adopted the McClellan proposal in Subsections 3161(b) and (c)—a 30-day limit from arrest to indictment and a 60-day period between indictment and trial.

In 1967 the President's Crime Commission suggested that in the average case the delay between arrest and indictment should only be approximately 15 days and a recent survey conducted by the Administrative Office of the United States Courts for the Constitutional Rights Subcommittee found that several District courts were able to indict defendants within 30 days. The Committee arrived at the 30-day time limit for the period between arrest and indictment based on this data.

While the Committee has concluded that it is necessary to minimize the delays currently experienced during the arrest to indictment period, it recognizes that complexity of the grand jury process sometimes lead to unavoidable delays. For this reason, the time limits imposed by this subsection are subject to special tolling provisions as provided in subsection 3161(h). For example subsection 3161(h)(8) specifically provides that grand jury proceedings which are sufficiently complex are to be exempt from the arrest to indictment time limits.

Section 3161(h) provides other enumerated exclusions from both the arrest to indictment and the indictment to trial time limits. Most of the exclusions apply to pretrial proceedings which take place after indictment. However any exclusion of time or tolling of time limits permitted by 3161(h) would be permitted whether it occurred before or after indictment.

Prepared Statement of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 178-79

(2) Subsection 3161(b) sets a 30-day time limit on the period between arrest and indictment. The exceptions to the time limits contained in subsection 3161(h) do not take into consideration the situation in many rural districts, with small caseloads, where today the grand jury meets infrequently, in some districts only twice a year.

The rigid requirement of filing an indictment or information within 30 days of arrest would require that a grand jury be in continuous session in every district court in the nation, no matter how small the caseload. In the State of New Hampshire, for example, there were only 46 criminal cases docketed during the entire fiscal year 1974. May I suggest, Mr. Chairman, that promptness in the filing of an indictment following arrest is important in the administration of criminal justice, but rigidity of time limitations could result in unwarranted and unnecessary expense and confusion.

Ths [*sic*] problem is emphasized in the Advisory Committee Note to Rule 50(b) which reads in part:

> Providing specific time limits for each stage of the criminal justice system is made difficult, particularly in federal courts, by the widely

varying conditions which exist between the very busy urban districts on the one hand and the far less busy rural districts on the other hand. In the former, account must be taken of the extremely heavy caseload and the prescription of relatively short time limits is realistic only if there is provided additional prosecutorial and judicial manpower. In some rural districts, the availability of a grand jury only twice a year makes unrealistic the provision of short time limits within which an indictment must be returned. This is not to say that prompt disposition of criminal cases cannot be achieved. It means only that the achieving of prompt disposition may require solutions which vary from district to district. Finding the best methods will require innovation and experimentation.

(3) Subsection 3161(c) requires that a trial commence within 60 days of indictment. Neither this subsection nor subsection 3161(h) take into account the geographical problems of small courts with numerous outlying places of holding court established by statute where there is no resident judge.

In the Eastern District of North Carolina, for example, there are eight statutory places of holding court, but only three resident judges. For the efficient dispatch of judicial business, both civil and criminal, the court has established sessions at each location during the year at publicly stated times which are generally more than 60 days apart. Altogether the statutes provide for holding court at 357 locations in the 91 United States district courts in the 50 states, the District of Columbia and Puerto Rico. There are resident judges at only 173 of these locations.

Testimony of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 186

The rigid requirement of filing an indictment or information within 30 days of arrest would require that a grand jury be in continuous session in every district court in the Nation, no matter how small the caseload.

Mr. CONYERS. Except if there are no cases. I mean, if it is a small district, and there is a small volume of cases, there would be no need for them to sit if they don't have any work. But wouldn't you think that, even if there was one person arraigned, he would be entitled to that same due process accorded any other defendant within any of the districts throughout the Nation, regardless of how many or how few there were?

Mr. KIRKS. I think you have to balance all of the equities, Mr. Chairman, the rights of the individual, the capability of the Government to sustain and support those rights and to perform its governmental responsibility.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 198-200

On page 2, at line 12, amend section 3161(b) by changing the period at the end of the sentence to a comma, and by adding the following additional language:

> "But if a defendant has been charged with a felony and no grand jury has been in session in the district during such thirty day period, then an additional thirty days shall be allowed for the filing of an indictment."

Comments

Out of the 94 judicial districts, there are very few that have sufficient criminal prosecutions to require a grand jury, or grand juries, in session during all twelve months of the year. A substantial majority of the districts will never have sufficient numbers of criminal prosecutions to warrant monthly sessions. Unwarranted and frequent sessions of the grand jury do cause acute problems to grand jurors in maintaining their employment and/or businesses. Even in the extremely busy districts, there will be some months, perhaps December and one or more summer months, that would result in considerable imposition on grand jurors to require their meeting each month of the year. The above proposed additional language is for the purpose of dealing with the several foregoing contingencies while at the same time insuring the speedy 30 day grand jury consideration of felony matters in districts where a grand jury is in session, and avoid [*sic*] the substantial probability of release of a dangerous defendant in event a grand jury is not reasonably available.

At page 2, lines 13 through 17, amend section 3161(c), by deleting the language set forth in subsection (c) in its entirety and inserting in lieu thereof the following:

> "(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared in such district where the said charge is pending, whichever last occurs. Thereafter, where a plea of not guilty is entered, a defendant shall be tried within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer."[1]

Comments

Inasmuch as at least 86% of defendants do not go to trial (in FY '73 55,174 out of 64,093 not tried), it would seem to be an extravagant use of judicial, defense and prosecution resources to expend unnecessary scheduling and planning efforts for a trial until the defendant indicates that he desires a trial. Arraignment of necessity must come before the scheduling of trial. Defendants are often arrested after the return of an indictment, or after an information has been filed, and are frequently arrested in districts other than the district of the offense.

The Court has enough uncontrollable delays in the scheduling of trials as a result of the "mini-trials" (hearings) on pretrial suppression and discovery motions without adding to this uncontrollable list the real probabilities of additional pretrial hearings by defendants who are not under arrest at the time of the filing of the information or indictment, and who are often times arrested across the country from the place of the filing of charges. Such situations would often require the bringing of not only federal personnel but state, local officials and citizens across country in order to resolve defendants [*sic*] (usually spurious) claims of prosecutorial delay in obtaining defendant's presence in the district of the offense. Rule 48(b) is the appropriate vehicle for the court to deal with any prosecutorial delay in obtaining the appearance of a defendant who is not arrested, or answerable to the court, at the time of the filing of an information or indictment. In his letter of December 14, 1972, to Senator Ervin, Deputy Attorney General Erickson wrote as follows:

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[1] While strongly recommending the above language, in need for recognition of the importance of arraignment in planning for the orderly disposition of cases, the following language is proposed as an alternative to the above:

"(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared in such district where the said charge is pending, whichever last occurs. Thereafter, the defendant shall be tried within sixty days from the filing of the information or indictment, or within sixty days from the date the defendant has been ordered held to answer and has appeared in the district where such information or indictment is pending, whichever last occurs." [Footnote in original.]

> ". . . Because of the problems which can arise from extensive grand jury investigations after arrest, the times and places of arrest in multiple defendant cases, the availability of a grand jury in some rural districts, proceedings under Rule 20 and 40, F. R. Crim. P., and transfers pursuant to Rule 21(b), F. R. Crim. P., the only orderly starting point for the computation of time limits, in the Department's view, is the date of arraignment. The many complications which would result if the computation is commenced at any other starting point were fully discussed in our letter of October 19, 1971. For the reasons therein stated, we believe it to be essential that the computation of time limits begin from the date of arraignment.
>
> "Moreover, selection of arraignment as the starting point will not lead to unnecessary delay since the Court has authority under existing law to dismiss a case if there is unnecessary delay in presenting a charge to a grand jury or in filing an information against the defendant who has been held to answer to the district court. See Rule 48(b), F. R. Crim. P. All other cases would be subject to the appropriate Statute of Limitations.
>
> "It should also be noted that the Model Plan drafted by the Committee on the Administration of the Criminal Law of the Judicial Conference for the implementation of new Rule 50(b), F. R. Crim. P. designates the date of arraignment as the beginning point for the computation of time for the trial of criminal cases."[*]

The orderly process for the administration of justice would seemingly require that the statute fix a specific period of time for the holding of an arraignment, from the filing date of the indictment or information if the defendant has been previously arrested on a complaint or from the date the defendant has been held to answer in the district of the offense, whichever event last occurs. Thereafter, if a defendant does plead not guilty, then[†] defendant should be tried within a specified period from arraignment and at such place, within the district, as may be fixed by the appropriate judicial officer. Comments with respect to setting the trial at a place within the district is [*sic*] discussed under the comments following section 3161.[‡]

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[*] Ellipsis in original.

[†] So in original. Probably should be "the."

[‡] So in original. Reference should be to section 3161(a).

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 203

The department proposed the following new section to be added to title I of the bill:

SEC. 102. Title 18, United States Code, is amended by adding a new sentence at the end of section 3321 to read as follows:

> "A grand jury may be summoned from the entire district, or from any statutory or nonstatutory division or divisions thereof, and a grand jury so impanelled shall be empowered to consider offenses alleged to have been committed at any place in the district."

Comments

While the Circuit Courts of Appeals, when called upon, have ruled in accordance with the tenor of the above proposed language, the question does occasionally arise in district courts and a statute, such as the above, recognizing the right of a (division) grand jury to consider offenses alleged to have occurred at any place in the district would avoid further future litigation.

Prepared Statement of James L. Treece, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 206-07

The time periods in the bill ignore realities of practice. Time periods should run from arraignment in the charging district rather than from initiation of the charge, whether such period be 60 days or 180 days. Prior to arraignment in the charging district delays may easily arise. For example, prisoners aren't moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado during which time he will be provided an attorney and perhaps have a hearing relative to his removal.

A defendant released on bond and ordered by a magistrate in Florida to go to Oregon has to do it on his own—that is at his own expense and in his own way and he may not show up for several weeks.

The proposed Federal Rules of Criminal Procedure would require U.S. Attorneys to make greater use of summonses. This is a cumbersome process. To save expense we frequently will mail the summons. If that doesn't produce the defendant we then have the marshal serve the summons. If that doesn't bring the defendant in, we get an arrest warrant and have him arrested. But, if our time is to run from the date of the charge, then we cannot afford to use the summons method of bringing defendants in. We will have to have defendants arrested as soon as possible. Likewise this bill would permit time to run against the prosecution while the defendant is being looked for. What problem will that cause? Well, we will ask the subject law enforcement group to put aside its other work and go on manhunts to the detriment of investigations which should be done. Unless we go all-out, we cannot be sure the court will hold that the whereabouts of the defendant were unknown between charge and eventual arrest. We prosecutors will have to marshal the intelligence resources of the various federal agencies and move closer to one police force. Otherwise we will risk the court holding that the whereabouts of the defendant were not unknown because for example if we had checked with the Chicago police they could have told us the defendant was in Chicago or had we checked with IRS they could have told us where the defendant was when he filed his last tax return or had we checked with Social Security they could have told us where the defendant received his last disability check.

All of these problems and many more I could mention could be obviated by having one time limit and it should commence with arraignment in the charging district.

Testimony of H. M. Ray and James L. Treece, Members, Advisory Committee of U.S. Attorneys, 1974 House Hearings 215

[Mr. RAY.] But we sincerely believe you should go back to the concept that was started in 1969 or 1970, when I first started commenting up through channels on this, going back to the arraignment and start your time running from arraignment, then you can wash out these problems to a large extent that would occur from the defendants that were arrested after charges, after indictments in far distant States or even in your own jurisdiction.

Mr. COHEN. Is it your experience—I ask all of you here—is it your experience most of the guilty pleas come at arraignment time?

Mr. TREECE. No. Generally after trial has been set, approximately a month or 45 days after arraignment.

Mr. COHEN. And it usually comes as a result that they finally realize they are going to trial and you line the witnesses up and say either plead or stand ready to go to trial?

Mr. TREECE. Right. And during this period, of course, the defense attorney is examining the government's case and doing his own interviewing.

Mr. COHEN. And the government's docket usually.

Mr. TREECE. Yes.

Testimony of H. M. Ray, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 219

I think in our recommendation on 3161(b) of the bill, we would propose that language like this be used. Change the period to a comma after 30 days, and put this language in to take care of rural districts—60 percent of the districts, or perhaps more—"but if the defendant has been charged with a felony and no grand jury has been in session in the district during such 30-day period, then an additional 30 days shall be allowed for the filing of an indictment."

Even in the busiest district I think jurors are entitled to be off Christmas and perhaps vacation in the summer. I am sure some districts, even big districts, do take off in December and maybe July.

So I think using that as a predicate, you can also satisfy the Constitution problem, the problem you used, Congressman Cohen. So we would suggest that 3161(b) provide for these districts that we believe will never have enough work to justify having the jury come in once a month.

You see, my real criticism of this bill is everybody has gone off on the premise that southern New York, maybe northern Illinois, are the problems. Well, they sit in one courthouse. Most of the districts try cases in divisions, and I have four divisions. They are statutory divisions, by the way, so we draw our grand jury from the district at large. Some of the places have district grand juries. So they are totally unlike the southern New York and northern Illinois situations.

Testimony of H. M. Ray, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 220

I would like to come back to the one question which I think is about the most important feature in the bill, 3161(c), the starting of the timing. The bill, as you know, provides 60 days from the filing of charges. We would propose that a lot of problems would be solved if you would use language like this, in lieu of that:

> The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared in such district where the said charge is pending, whichever last occurs. Thereafter, where a plea of not guilty is entered, a defendant shall be tried within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

If I might be heard just a minute on that. You see, by starting at this point, you avoid a lot of frivolous motions, by habitual criminals especially. You have an orderly starting point and* arraignment.

If the committee feels we are trying to get another 10 days, we have an alternative. We have suggested language in the exhibits.

I know you are in a hurry to get away here now, and I just want to say that is one of the most important amendments that we could offer to you to make this palatable.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 9-10

The basic differences between H.R. 17409 and S. 754 are as follows:

. . . .

4. *Time Limits to Trial.*—S. 754 computes the time limits between the periods of arrest to indictment and indictment to trial. At the suggestion of the Department of Justice, the Subcommittee adopted an amendment to begin the running of the time limits to trial from arraignment. An additional 10 days were added between indictment to [*sic*] arraignment.

5. *Filing Indictments.*—At the request of both the Department of Justice and the Administrative Office of the United States Courts, the Subcommittee adopted an amendment which would permit up to 30 additional days for the filing of an indictment in those districts where grand juries meet infrequently. This amendment is intended to give more flexibility to rural districts, where criminal case filings do not warrant the continuous operation of the grand jury.

1974 House Committee Report 22

In cases where the accused is already serving a term of imprisonment either within or without the district, the attorney for the Government is required to promptly initiate procedures to protect the defendant's right to speedy trial by either seeking to obtain his presence for trial or filing with custodial authorities a detainer and request to advise the defendant of his right to demand trial. Upon receipt of such detainer, the official holding the prisoner must promptly advise him not only of that right, but also must apprise him of the charges lodged against him. If the detainee does exercise his right and demands trial, the custodian must certify that fact promptly to the prosecutor that caused the detainer to be filed who, after receiving the certificate, is then bound to obtain the defendant's presence for trial. After the prosecutor makes such a properly-supported request for temporary custody, the defendant must be made available for trial without prejudice to traditional rights in cases of interjurisdictional transfer. The computation of time for trial begins once the defendant's presence has been obtained, unless the court finds in considering his subsequent claim for dismissal, under the provisions of this legislation, that the prosecutor is responsible for unreasonable delay in either filing a detainer or seeking to obtain the accused person's presence.

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*So in original. Probably should be "at."

1974 House Committee Report 29-31

Section 3161(b) provides that any information or indictment charging an individual with an offense must be filed within 30 days of the date the accused was arrested or served with a summons. At the request of the Justice Department, the subcommittee adopted an amendment which would allow districts in which no grand jury was in session during the 30-day period following the arrest of, or issuance of the summons to, an individual an additional 30 days in which to file an indictment.

This amendment recognizes the fact that a number of districts do not have a sufficient number of criminal cases to warrant the continuous operation of the grand jury. The subcommittee found that, in 34 districts, grand juries convened 0 through 10 days; in sixteen districts, 11 through 20 days; and, in fifty districts, 20 or less days during the six-month period from January through June, 1974. Although the Committee recognizes the expenses to the Government and inconvenience to grand jurors, particularly in the larger geographic districts, involved in convening grand juries for a limited number of cases, it believes that every effort should be made to indict individuals within the time limits provided, and invoking this extension only when necessary.

The Justice Department, in a memorandum to the Subcommittee requested by Mr. Cohen, concluded that this provision would not result in the denial of equal protection of the law for defendants accused of crime who are forced to await indictment in districts where grand juries meet infrequently.

. . . .

Section 3161(c) provides that the arraignment of a defendant shall take place within 10 days from either the time the indictment or information is filed and made public or, in the case of a defendant who has not previously appeared before the court, from the time he is ordered held to answer and has appeared before a judicial officer of the court in which the charge is pending, whichever last occurs.

After arraignment, a defendant is required to be brought to trial within 60 days at a place within the district set by the court. This language was substituted for that of the original Senate provision, again at the request of the Justice Department. The purpose of the amendment is to begin the running of the time limits from a logical point in the proceedings. At arraignment, the defendant is required to plead to the charge contained in an information or indictment. The Department pointed out that it would be a waste of judicial resources to require the courts to schedule trials at the time of the filing of an indictment, due to the possibility that the defendant may choose to plead either guilty or *nolo contendere*, thus making trial unnecessary. The Committee believes that this provision is more consistent with the goals of Section 3161(a), which requires the court to set trial for either a day certain or on a weekly or other short-term calendar. The scheduling of trials for defendants who will ultimately plead guilty only serves to make more difficult the scheduling of trials for those who will demand them.

Unfortunately, however, the Committee must point out that statistics show that beginning the running of the time to trial from arraignment will not have a substantial impact on reducing the unnecessary scheduling of cases, since the median time it takes for a defendant to plead guilty from the date he is indicted or an information is filed is 3.1 months in the Federal system. In this respect, the following dialogue took place between Mr. Cohen and Mr. James L. Treece, the United States Attorney for the District of Colorado in hearings before the Subcommittee:

> Mr. COHEN. Is it your experience—I ask all of you here—is it your experience most of the guilty pleas come at arraignment time?
>
> Mr. TREECE. No. Generally after trial has been set, approximately a month or 45 days after arraignment. [Hearings, p. 215.]*

In addition, the Justice Department noted that other delays may also arise prior to arraignment in the charging district. As an example, the Department cites the difficulty in moving prisoners coming into the district from out-of-state. In this regard, Mr. Treece said:

> For example, prisoners aren't moved immediately when ready because the marshals try to make their trips worthwhile by combining the movement of several prisoners. So it may take several weeks to get a prisoner from Florida to Colorado during which time he will be provided an attorney and perhaps have a hearing relative to his removal. [Hearings, p. 206.]†

The Committee cannot conclude that inconvenience to the United States marshals or the minimal expense of transporting prisoners is an excuse for delaying the arraignment of a defendant. This provision is not intended to give the attorney for the Government the discretion to extend the time for arraignment beyond 10 days where the defendant's presence could have been obtained by the exercise of prosecutorial initiative.

This provision is intended to permit the attorney for the Government to issue a summons in lieu of an arrest warrant. Mr. Treece, in his prepared statement, pointed out that normally, if the Government mails summonses and if they do not produce the defendant, they are served by a Federal marshal. If this does not produce the defendant, an arrest warrant is sought and the defendant is arrested. This procedure could potentially be time-consuming if the attorney for the Government fails to execute each procedure with dispatch. The United States Attorney should attempt to set time limits on the mailing of summonses and the subsequent arrest procedure. Under Rule 9 of the Federal Rules of Criminal Procedure, a summons or warrant returned unexecuted "at any time" while the indictment or information is pending may be delivered by the clerk to the marshal or other authorized person for execution or service. The words "at any time" could create unnecessary delay in securing the arrest of a defendant who fails to make return of a summons on the return day. Flexible time limits should be placed on the period from the mailing of the summons to the return date, between the return date and service of the summons by a marshal, and between the return date of the subsequent summons and the execution of an arrest warrant.

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*Brackets in original.

†Brackets in original.

1974 House Committee Report 36

Any reading of this legislation should make it clear that proceedings [pursuant to section 3161(j)] regarding a prisoner against whom charges are brought while he is serving a term of imprisonment pursuant to an earlier conviction are "proceedings against the defendant" in the same sense as provided in section 3161(h)(1), and that delay resulting from such proceedings, therefore, is excludable and tolls the time limits set forth in section 3161. It should be equally clear that the time for trial begins to run as soon as the prisoner is arraigned, which must occur within ten days either of filing of charges or the date the defendant has been ordered held to answer and has appeared, whichever happens last, as set forth in Section 3161(c). Consequently as soon as the prisoner's presence for trial on charges pending against him has been obtained, the time limits during which he must be brought to trial begin; this means that, if the prisoner does not waive his right to contest the legality of the demand for temporary custody, any time period consumed by proceedings, related to that contest is excludable from the time allowed to bring the prisoner to trial, for the reasons stated above. Similarly, if the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under section 3161(a)(2).* In addition, the Committee feels that, since the prejudice an incarcerated defendant may suffer is potentially so great, the attorney for the Government is also subject to sanction for such unreasonable delay under section 3162(b)(4). The Committee does not believe that this imposes any hardship upon the attorney for the Government since, unlike state practice in many jurisdictions where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for purposes of pleading.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41780-81

Mr. ALEXANDER. Mr. Chairman, I thank the gentleman for yielding. I take this time to ask the gentleman a question.

My concern is based upon the provisions of the bill that require that an information or indictment must be filed within 30 days after arrest or that charges against the defendant may not later be brought, and the further provision that the trial must be held within 60 days after arraignment or indictment or the defendant must be released.

I am familiar with Federal courts where there is only one judge, and extraordinary time requirements ensue as a result of unusual cases, like the bakery conspiracy cases in 1960's, or a protracted patent or copyright case that might require weeks for trial, or, as we have seen recently, the Dakota trials of the Indian insurrection, or a Watergate type trial.

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*So in original. Probably should refer to section 3162(a)(2).

My question is, are there exceptions to these time limits which take into consideration the extraordinary time required for litigation of cases that require protracted trials in one-judge courts?

Mr. CONYERS. The gentleman raises a very pertinent point, and this legislation was amended in subcommittee by the gentleman from Maine (Mr. COHEN) to recognize the special problems that exist in rural districts. For those jurisdictions where grand juries sit infrequently because of the small number of criminal case filings as the case may be in rural areas, we added a provision that would extend the time period for filing an indictment up to 30 days where no grand jury has been in session following the arrest of a defendant to the running of the time limit between indictment and trial.* Additionally, a provision was included to allow the court to schedule trial at any place within the judicial district to insure that the defendant receives a speedy trial in large geographic districts in which judges are required to travel from division to division.

Mr. ALEXANDER. I thank the gentleman, but I am still concerned that additional consideration of this point is needed.

Materials from the History of the 1979 Amendments

1979 Justice Department Bill § 3

SEC. 3. Section 3161(c) of title 18, United States Code, is amended to read as follows:

"(c)(1) The trial of a defendant charged in an information or indictment with the commission of an offense shall commence within one hundred and twenty days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint the trial shall commence within one hundred and twenty days from the date of such consent.

"(2) The trial of a defendant shall not commence less than thirty days from the date specified in paragraph (1) without the consent of the defendant.".

Section-by-Section Analysis of 1979 Justice Department Bill, Enclosure to Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4330 (daily ed. Apr. 10, 1979)

Section 3 will merge the ten-day interval now provided by 18 U.S.C. 3161(c) for arraignment after filing of an indictment or information with the sixty-day arraignment-to-trial interval, and enlarge the consolidated interval to 120 days. The section also provides that trial before a magistrate upon a complaint must be commenced within 120 days of the filing of the defendant's consent to be tried by a magistrate. Finally, the section provides that trial cannot be scheduled sooner than thirty days after the filing of an information or indictment, without the consent of the defendant.

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*So in original. The time limit under discussion was the limit between arrest and indictment.

1979 Judicial Conference Bill § 2

With the exception of a minor difference in punctuation, this section was identical to section 3 of the 1979 Justice Department bill, set forth above.

Section-by-Section Analysis of 1979 Judicial Conference Bill, Submission of Administrative Office of the U.S. Courts, 1979 Senate Hearings 733

This section would make several changes in 18 U.S.C. § 3161(c). First, it would replace the separate indictment-to-arraignment and arraignment-to-trial time limits with a single time limit of 120 days. Under existing law, the permanent separate time limits are 10 and 60 days, respectively.

Second, it would add a new provision that a defendant may not be compelled to go to trial in less than thirty days from the beginning date of this time limit (indictment or initial appearance in the district, whichever comes later).

Third, it would make it clear that the time limit to trial begins to run if the defendant consents in writing to be tried before a magistrate on a complaint. This change would fill a vacuum in the present law, which literally refers only to cases prosecuted on an information or indictment.

Fourth, it would eliminate the reference to a defendant having been "ordered held to answer." The phrase "hold to answer" is used in rule 5.1 of the Federal Rules of Criminal Procedure to refer to a decision at the conclusion of a preliminary hearing, which is a pre-indictment event. Its use in § 3161(c) to describe a post-indictment event has been a source of some confusion. Eliminating the phrase is not intended to effectuate any substantive change.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 51-53

Section 3 of the Department's bill will merge the ten-day interval now provided by 18 U.S.C. 3161(c) for arraignment after filing of an indictment or information with the sixty-day arraignment-to-trial interval, and enlarge the consolidated interval to 120 days. The section also provides that a trial cannot be scheduled sooner than thirty days after filing of an information or indictment, without the consent of the defendant. The enlarged time limits do not apply to defendants detained pending trial or to those designated "high risk."

Again we should examine what amount of time is required to properly prepare a case for trial after the indictment has been brought and, why we are recommending doing away with the separate indictment-to-arraignment interval. In any case, you will ask, why isn't 70 days for this combined period sufficient?

While the Department does not dispute the principle that arraignment should take place as soon after the indictment is brought or the information is filed as is possible, treatment of this period as a separately timed interval has created problems unforeseen at the time of its enactment, not the least of which is the harshness of requiring dismissal of the case simply because the arraignment took place on the eleventh day.

The problems seem to be the greatest in large geographic districts. In order to meet the 10-day limit, intolerable burdens of travel and expense have been placed on judges and court personnel, members of the bar, the United States Attorneys' staffs and defendants who have shuttled back and forth in order to meet the 10-day limit. People have had to travel as much as 350 miles a day for a 15 minute pro forma hearing. Counsel have in several cases resigned from the case after arraignment when trial was set in another place. The disruption of schedules and the expense have been unacceptable, with the deadlines still impossible to comply with in some instances.

Moreover, because of the short period of time allotted, defense attorneys do not have an adequate time to evaluate the case prior to the arraignment and therefore pro forma "not guilty" pleas are entered. Many defendants appear at 10-day arraignments without counsel because the time to obtain counsel is too short. In these cases additional court appearances are often necessary to change a plea or after counsel is obtained further complicating scheduling problems.*

Merging the indictment-to-arraignment interval with the arraignment-to-trial interval allows for the flexibility necessary to avoid some of these problems without adding to the prospects for delay. If more time were needed for a defendant to obtain counsel of his choice to appear at arraignment, it would be available. Judges, court personnel, and lawyers would not need to travel hundreds of miles to meet awkward arraignment dates because of the Act's strict limits. Yet the pretrial period as a whole would not have to be enlarged.

. . . .

Special emphasis should be made of the fact that the problems created by these strict time limits [in the 1974 act] apply at least equally to defense counsel as they do to prosecutors. In fact more often in these more complex cases, defense counsel needs are greater than ours because we have at a minimum prepared the case for presentation to the grand jury. In many of the more complex cases, especially in the white-collar crime area, we have spent considerably more time investigating the case. Sometimes the pre-indictment investigation can take years during which time the prosecutor has accumulated masses of documents on which he has spent a great deal of time and energy in review.

Equally serious problems arise for defense counsel in trying to rapidly become familiar with very esoteric federal laws or specific standard business practices and operating procedures. Often there is a need to become expert in the details of the particular regulations of a federal agency.

Defense counsel also has the particular problems, raised most often in multi-defendant cases, of potential conflicts in representation and difficulties in coordinating among the lawyers on the defense team. Each of these special problems is supported by the OIAJ study.

It is in recognition of the special problems often faced by defense counsel that the Department has included a provision in its bill requiring a minimum of 30 days for defense preparation. This insures the defendant of some minimum preparation time even in the simplest case.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 55

Section 3 will also provide that trial before a magistrate upon a complaint must be commenced within one hundred twenty days of the filing of the defendant's consent to be tried by a magistrate. The current Act does not provide limits for magistrates' trials of complaints. The amendment will impose the same limitation as in those cases in which an indictment or information has been filed.

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*Punctuation so in original.

Prepared Statement of Judge Alexander Harvey II, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1979 Senate Hearings 62

Both of these bills will eliminate altogether the indictment to arraignment problem area, inasmuch as both bills contain no requirement that an arraignment be held within a fixed period of time after an indictment is returned. The setting of the arraignment date would be left to the trial judge, who would be required merely to arraign a defendant on some date before the trial. This change is not inconsistent with the objectives of the act. The public interest in speedy trials does not require that arraignments be held at any particular time. Yet the 10-day interval between indictment and arraignment has been one of the most bothersome provisions of the act, particularly in judicial districts that extend over large areas. We do not believe that merely enlarging the time period from 10 to 20 days would eliminate the difficulties that the various district courts have been encountering. The change proposed would also save time in cases disposed of by guilty pleas. Under the present practice, a defendant usually does not have time to complete plea negotiations before the 10-day arraignment period. Both an arraignment and a rearraignment are necessary in most cases in which a guilty plea is entered. Under the proposed changes, only one arraignment would be required.

. . . .

Both bills provide that trials cannot begin within 30 days unless the defendant consents. This provision is designed to give a defendant at least 30 days to prepare for trial and would prohibit a trial judge from setting a trial before that time.

1979 Senate Committee Report 23-24

The genesis of the provision in the Act imposing a third time interval, besides arrest and indictment and indictment and trial, was an amendment suggested to the House Committee on the Judiciary by the Department of Justice. The Department's representatives contended at the time that, because a high percentage of criminal cases are disposed of by plea, it is an unwise and "extravagant use of judicial, defense, and prosecution resources to expend unnecessary scheduling and planning efforts for a trial until the defendant indicates that he desires a trial." The Department also felt that the date of arraignment would be the most logical point along the arrest-trial span to fix a date for trial.

The Department has testified that, in recognition of several unforeseen problems, it now recommends enlarging the indictment-trial interval by ten days and eliminating the indictment-arraignment period. That recommendation is also supported by the Judicial Conference and the American Bar Association.

Because the fixed indictment-arraignment period of ten days has indeed given rise to interpretive as well as practical problems, the Committee amendment eliminates it as a distinct period by merging the ten-day requirement with the time-to-trial period of sixty days. In the first place, although § 3161(c) was in fact amended to establish the third interval, corresponding changes to § 3161(h) (excludable delays) and § 3162 (sanctions) were not, and the legislative history is in conflict. Thus, the Second Circuit's guidelines conclude that there is no penalty intended if the defendant is not arraigned within ten days of indictment. The Administrative Office—which issues advisory guidelines to the districts—has apparently taken the opposite position.

Since, logically, the Congress would have defeated its own attempts to make the Act flexible by imposing the penalty of dismissal if the limit was not complied with without the benefit of exclusions where necessary, the Committee is constrained to agree with the commentator who attributed this inconsistency to "a last-minute drafting error." Furthermore, the practical consequences of observing the ten-day period without benefit of excludable delay would outweigh any measurable scheduling advantages. Marshals would be under pressure to locate and arrest defendants; the necessity to travel to meet the deadline in sparsely-populated districts would impose heavily on parties before the court; indigent defendants arrested and arraigned without counsel would either be denied the opportunity to obtain counsel, of choice, or pleas would be entered pro forma; and defense counsel, who are often not aware of the charges against their clients until the indictment is returned or their clients are actually in custody, would often be denied a reasonable opportunity to discuss the entry of a plea with them. Finally, a fixed indictment-arraignment requirement without sanction is largely meaningless, since no incentive would exist to schedule arraignment at the earliest practicable time.

1979 Senate Committee Report 31

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:

> (1) merging the present 10-day indictment-to-arraignment and 60-day arraignment-to-trial intervals into a single, 70-day period [§ 3161(c)(1)];
>
> (2) guaranteeing the defendant a reasonable period in which to obtain counsel and prepare for trial—30 days from the date the defendant appears through counsel or elects to proceed *pro se*, unless the defendant waives the right conferred [§ 3161(c)(2)]; . . . .*

1979 Senate Committee Report 32

Section 2 amends § 3161(c) to merge the second interval (indictment to arraignment) into the third interval (arraignment to trial). Thus, instead of 30-10-60 day intervals, the Act would operate on a 30-70 day (arrest to indictment, indictment to trial) basis.

Both S. 961, as introduced, and S. 1028 would make this change. In addition, a new paragraph (2) prohibits any trial from occurring within 30 days "from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed *pro se*", unless the defendant consents in writing to an earlier trial. This provision assures the defendant some minimal time to prepare. It is similar to a comparable provision in the Justice Department and Judicial Conference bills; however, those bills provide that the 30-day minimum is to be measured from the date of indictment or bail hearing.

Prohibiting trial less than 30 days after the date the defendant appears in a position to begin preparing his defense more fully protects basic due process rights. It is the Committee's intent that the exclusions provided in section 3161(h) apply to the 30-day minimum to-trial provision. Therefore, if an event occurs which would automatically exclude time under subsection (h), such as a pretrial mental examination, that time is not only excluded from computing the time within which trial must occur prior to imposition of the dismissal sanctions, but time would also automatically be excluded in computing the 30-day minimum period of time, during which the judge could not schedule trial without the defendant's consent.

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*Brackets in original.

Having said that, the Committee wishes to stress that this minimum-preparation time guarantee is not to be construed to permit the defendant to delay unduly the trial date, especially where permissible excludable delay is found. If, for example, counsel for the defendant moves for an "end of justice" continuance under section 3161(h)(8) to allow him or her additional time to prepare for trial, the court should scrutinize closely his or her good-faith efforts to prepare inside the time fixed for trial, taking into account other excludable delays. Again, the court should take great care to balance the defendant's and society's speedy trial rights against the "ends of justice" to be served by granting such a motion.

1979 House Committee Report 1

The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

. . . .

2. Merging the 10-day indictment-to-arraignment and the 60-day arraignment-to-trial time limits contained in section 3161(c) into a single 70-day indictment-to-trial period;

3. Requiring, in the absence of a waiver by the defendant, a minimum of 30 days time between the defendant's first appearance with counsel and trial; . . . .

1979 House Committee Report 9

Section 3161(c) of Title 18 provides that defendants must be arraigned within 10 days of the filing date of an indictment or information, and trial commenced within 60 days of arraignment. The separate indictment to arraignment period was added to the act, at the recommendation of the Department of Justice, during consideration of the legislation by this Committee in 1974. The Justice Department now recommends that this separate interval be eliminated, and the interval be merged into a 70-day indictment to trial interval. There appears to be little positive contribution of this separate interval, and the Justice Department reports that it imposes unnecessary travel hardships upon courts and parties to meet the deadline in sparsely populated districts, as well as hardships upon defendants in obtaining counsel prior to arraignment. The Judicial Conference and the American Bar Association join in this recommendation, and the Committee adopts it.

1979 House Committee Report 11

Section 2 of the bill amends section 3161(c) of Title 18 to merge the 10-day indictment to arraignment period and the 60-day arraignment to trial period into a single 70-day indictment to trial interval. A provision is added to section 3161(c) to the effect that, unless the defendant so consents, trial may not com-

mence less than 30 days from the date the defendant first appears through counsel or elects to proceed pro se.

18 U.S.C. § 3161(d)

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

Derivation

Mikva bill, § 3161(a)(2) (p. 280): "If the indictment or information is dismissed upon motion of the defendant and thereafter the defendant is charged with the same crime or a crime based on the same conduct or arising from the same criminal episode, [the time limit to trial shall run] from the date the defendant is so charged, as stated in the preceding paragraph; . . . ."

Original Ervin bill, § 3161(b)(2) (p. 287). Minor language changes.

1972 Senate subcommittee bill, § 3161(b)(2) (p. 297). Limited the applicability of the provision to cases in which "the indictment or information is dismissed upon motion of the defendant for reasons other than those provided in section 3162(a)," which required dismissal for failure to comply with the time limit to trial. Also made the time limit on the new charge run from "the date the defendant is arrested or served with a summons with respect to such charge, except that if the prosecution is initiated by filing an information or indictment prior to arrest or summons (and made public), then within sixty days from the date of such filing." Under this language, the time limit on the new charge was parallel to the time limit the bill provided for an original charge.

1974 Senate committee bill, § 3161(d) (p. 311). Added the references to dismissal or dropping of a complaint and to the subsequent charge being contained in a complaint, information, or indictment; recast the subsection so that the parallel with the treatment of an original charge was handled by reference to the subsections governing original charges.

1974 House subcommittee bill, § 3161(d) (p. 337). Minor punctuation change.

1974 House committee bill § 3161(d) (p. 337). No change.

Amended on House floor, 120 Cong. Rec. 41793-95, to eliminate the reference to "reasons other than those provided in section 3162(a)."

1974 act, § 3161(d) (p. 375).

Amended in 1979 to add paragraph (2); the former subsection (d) was redesignated as section 3161(d)(1). The House accepted the Senate provision without change.

ABA standard 2.2(b) provided, if an indictment, information, or other charge sufficient to support a prosecution is dismissed on motion of a defendant, that the time limit on a new prosecution runs anew from the date the defendant is again held to answer or a new charge is filed, whichever is earlier. The commentary to standard 2.2(a) indicated that a similar rule would obtain if the defendant was released outright prior to the filing of an indictment, information, or other document that would support a prosecution.

Editor's note: Beginning with the 1972 Senate subcommittee bill, all versions of this subsection until the 1974 House floor amendments made reference to the dismissal sanction under section 3162(a); section 3162(a) itself was subject to substantial changes in this period. The language added as section 3161(d)(2) in 1979 is largely modeled on language found in section 3161(e); the legislative history of that provision may therefore be relevant.

Materials Addressed to Original Ervin Bill

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35

In Section 3161(b)(2), it is provided that, if the indictment or information is dismissed upon the defendant's motion and he is subsequently recharged with the same or a related offense, the 60 day period will run from the time of recharge. This provision, which follows Section 2.2 of the ABA's Standards Relating to Speedy Trial, is fair. In the commentary on that section, however, the ABA Standards note that if a defendant's motion for dismissal based on a failure to prosecute within the prescribed period is granted, there cannot be a subsequent charge based on the same event. This seems obvious, and Section 3162 would undoubtedly require this result. It would, nonetheless, be desirable to make this point clear in the language of Section 3161(b)(2) or the legislative history.

"Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 71

Section 3161(b)(2) discusses a crime based on the same conduct or arising from the same criminal episode. In many Federal cases the crimes are complicated and the facts of one particular crime lead to the discovery of many more after conviction of the initial offense. Section 3161 seems to bar prosecution of complicated cases, yet this certainly is not the intent of the statute.

Letter to Senator Ervin from Edward L. Barrett, Jr., Oct. 26, 1970, at 1971 Senate Hearings 159

I don't understand what is meant here by the word "charged". Just what act by the government starts the time running?

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 49

TIME LIMITS FOR A SECOND PROSECUTION AFTER DISMISSAL OF INDICTMENT.—Subparagraph 3161(b)(2) deals with the situation where a defendant succeeds on a motion to dismiss based on other than speedy trial grounds. It requires that any subsequent prosecution be treated in the same manner as the initial but unsuccessful prosecution. For example, where a defendant succeeds in a motion to dismiss because of a faulty indictment, the Government can file a new indictment and the 60 days begins to run with the rearrest or new indictment, whichever comes first.

The committee has retained this provision but with a few clarifying language changes. One change is designed to resolve ambiguities pointed out by the Justice Department. The Department noted that the original provision was unclear as to what would constitute a subsequent charge, and as to when time limits would commence.* This problem has been resolved by using the same language as used in subparagraph 3161(b)(1), which spells out when the 60-day period begins in a normal prosecution. Another change made in the subparagraph substitutes for "crime" which was used in the original provision, "offense" as defined in section 3166. This subparagraph is not intended to apply where a dismissal motion is granted on the grounds of lack of speedy trial, in which case no further charge is to be permitted.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 166

As part of an amendment whose principal purpose was to provide separate pre- and post-indictment time limits, Senator McClellan proposed the language that was included as section 3161(d) of the 1974 Senate committee bill.

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*The Department of Justice comment referred to is apparently not in the public record.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 167

Amendments to this provision were suggested as parts of two alternative amendments concerned with the dismissal sanction.

One amendment would have eliminated the dismissal sanction, and would have amended this provision to make it apply to a dismissal on motion of the defendant for "any reason."

The other amendment would have deferred the effective date of the dismissal sanction, and would have amended this provision to make it apply "[i]f, prior to the effective date . . . , the indictment or information is dismissed upon motion of the defendant for any reason; or if, on and after the effective date . . . , the indictment or information is dismissed upon motion of the defendant for reasons other than those provided in" the sanction provision.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 193

The following amendment was offered to make this provision consistent with a proposed amendment to make the time limit begin to run at arraignment:

> In order to make proposed Section 3161(b)(2) consistent with Section 3161(b)(1)(A), we suggest the following language:
>
> "If the indictment or information is dismissed upon motion of the defendant or of the court, and thereafter an information or indictment is filed against the defendant for the same offense or any offense required to be joined with the offense, the time limitation shall commence to run upon the defendant's arraignment on the subsequent indictment or information."

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 33

Subsection 3161(d) allows the time limits imposed by subsections 3161(b) and (c) to begin to run afresh should an indictment or information be dismissed upon defendant's motion on grounds other than non-conformance with speedy trial time limits, and a subsequent complaint charging the defendant with the same offense or with an offense based on the same criminal conduct or episode is filed.

This subsection allows latitude to the prosecutor to re-institute prosecution of a criminal defendant whose case has previously been dismissed on non-speedy trial grounds without having to comply with the time limits imposed by the filing of the earlier complaint. To require a prosecutor to conform to indictment and trial time limits which were set by the filing of the original complaint in order to reopen a case on the basis of new evidence would be an insurmountable burden. Thus, when subsequent complaints are brought, the time limits will begin to run from the date of the filing of the subsequent complaint.

The Committee is concerned that this provision not be used to evade the speedy trial time limits set out in this Act. The prosecutor should not be able to avoid the speedy trial time limitations when his carelessness in preparing the original complaint or indictment has resulted in a dismissal under this section. Therefore, when a judge dismisses an original information or indictment on other than speedy trial grounds he should, nevertheless, take into consideration the defendant's right to speedy trial under the statute and under the Constitution. For example, the judge might want to order that the original dismissal be with prejudice so that the prosecutor could not reindict several months after a carelessly drawn indictment has been dismissed.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41794

[T]he second amendment, Mr. DENNIS, simply provides that wherever a case is dismissed, the time limit shall start over again upon reprosecution. Now that we allow reprosecution under this amendment [to section 3162(a)], if it is adopted, any dismissal would start the time period running from the very inception once again, so it is only technical in nature.

Materials from the History of the 1979 Amendments

1979 Justice Department Bill § 4

SEC. 4. Section 3161(e) of title 18, United States Code, is amended by adding at the end thereof the following: "If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within sixty days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within sixty days impractical. The periods of delay enumerated in section 3161(h) shall be excluded in computing the time limitations specified in this section. The sanctions of section 3162 are applicable to this section.".

Section-by-Section Analysis of 1979 Justice Department Bill Enclosure to Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4330 (daily ed. Apr. 10, 1979)

Section 4 of the bill amends 18 U.S.C. 3161(e) to apply to trial upon indictments ordered reinstated by an appellate court the time limits currently provided for retrial necessitated by appellate proceedings. The amendment provides that the excludable delay provisions of 18 U.S.C. 3161(h) and the sanctions of 18 U.S.C. 3162 are applicable to the time limits governing trial upon a reinstated indictment.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 55

Section 4 will provide time limitations for trial upon indictments ordered reinstated by an appellate court overruling a district court's dismissal. The treatment is equivalent to that currently provided in section 3161(e) for the analogous case of retrial necessitated by appellate proceedings, which take [*sic*] into consideration the special problems frequently occasioned by the length of time it takes to complete appellate proceedings and the consequent difficulties encountered in preparing for trial. The amendment also makes it clear that the excludable delay provisions of section 3161(h) are applicable as well as the sanctions of section 3162.

1979 Senate Committee Report 31

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:

> . . . .
>
> (3) assuring necessary flexibility where a defendant is to be retried following the dismissal of an indictment, which is reinstated following appeal, or where he is to be retried following other appeals, declaration of mistrial or order for new trial . . . .

1979 Senate Committee Report 32-33

Section 3 amends § 3161(d) to reflect the Justice Department's proposal concerning the trial upon indictments dismissed by the trial court and subsequently reinstated on appeal. The only difference is that the time limits [*sic*] for such trial in the substitute is seventy days in order to make that limit consistent with the amendment to section 3161(c) contained in section 1.* However, the Committee amendment, like the Department's bill, permits the Court to extend the trial date up to 180 days, if passage of time or other factors make the shorter limits "impractical."

This amendment clarifies existing law and assures that, in the case of an indictment which is dismissed by the trial court but reinstated upon appeal, the time limits are the same as those under the Act when the defendant successfully secures a new trial on appeal. The amendment also specifies that the periods of excludable delay and the dismissal sanction are applicable, and make [*sic*] similar conforming amendments to § 3161(e).

1979 House Committee Report 1

The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

. . . .

4. Requiring that, if a defendant is to be tried on an indictment or information dismissed by a trial judge and reinstated on appeal, trial shall commence within 70 days, with provision for extension of this time limit to 180 days if trial within 70 days is impractical; . . . .

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*So in original. Should refer to section 2.

1979 House Committee Report 11

Section 3 amends section 3161(d) to assure that, when an indictment or information is dismissed by the trial court but reinstated on appeal, the time limits for retrial are the same as those applicable when the defendant secures a new trial on appeal. These limits are that the trial must commence within 70 days from the date of the action occasioning the new trial, with provision to extend this time up to 180 days if trial within 70 days is impractical. Section 3161(h) exclusions and continuances and the dismissal sanction of section 3162 are made specifically applicable to such cases.

18 U.S.C. § 3161(e)

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

Derivation

Mikva bill, § 3161(a)(3) (p. 280): "If the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, [the time limit to trial runs] from the date of the mistrial, order granting a new trial, or remand."

Original Ervin bill, § 3161(b)(3) (p. 288). Minor language change.

1972 Senate subcommittee bill, § 3161(b)(3) (p. 297). Added the authority of the court to extend the period to 180 days following an appeal or collateral attack; introduced the references to "the date the action occasioning the retrial becomes final."

1974 Senate committee bill, § 3161(e) (p. 312). No change.

1974 House subcommittee bill, § 3161(e) (p. 338). Minor language change.

1974 House committee bill, § 3161(e) (p. 338). No change.

No House floor amendments.

1974 act, § 3161(e) (p. 376).

Amended in 1979 to change the time limit from 60 days to 70 days and to add the last two sentences. The House accepted the Senate provision without change.

ABA standard 2.2(c) used the language that was included in the Mikva bill.

Materials Addressed to Original Ervin Bill

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 80-81

Then, in place of line 3 on page 3, if the defendant is to be tried again following a mistrial, and so forth, I think the provision which was made in the rule adopted by the Second Circuit, that it should be after these actions have become final, would be more appropriate there. Otherwise, you may have a trial in progress while the case is still subject to some appellate process. It is simply a detail, but I think it may be worth mentioning.*

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 253-54

[P]roposed section 3161(b)(3) specifies that a defendant must be "tried again" within 60 days from the date of a mistrial, an order granting a new trial, or a remand. It is noted that the meaning of the term "tried again" is not certain. In some cases, the remand may require only a rehearing, for example, on the sentence or on the insanity issue without otherwise disturbing a verdict of guilty returned at the original trial. It is not clear whether such limited proceedings must also be commenced within the 60-day period.

Further, it should be noted that an order for a new trial based upon a collateral attack may take place years after the original trial. In such situations, the Government is in a difficult position to gather the evidence again and to find witnesses who may have moved or whose memories may have become uncertain with the passage of time. It is necessary in situations of this nature that the Government have more time to prepare its case. Such a preparation may require a decidedly longer period of time than did the preparation for the original trial. It is difficult to imagine that preparation of the Government's case under these circumstances could be accomplished within the 60-day period specified. In addition, section 3161(b)(3) by specifying that the 60-day period commence running "following a collateral attack," effectively precludes the Government from appealing. Further, the language is too imprecise to fix the exact commencement of the time limitation. We suggest hereafter various changes for this section, which recognize these special problems in cases of collateral attack.

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*The Second Circuit rules referred to "the date when the order occasioning the retrial becomes final." 1971 Senate Hearings 341.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 263

[§ 3163](g)(1) If a defendant is to be tried with regard to any issue, following a mistrial, an order for new trial or an appeal, such trial shall commence within 180 days from the date the order of the court occasioning the retrial becomes final, subject to the provisions of section 3162.*

(2) If a defendant is to be tried with regard to any issue, following a collateral attack, such trial shall commence within a reasonable time, considering the availability of witnesses and other evidence and the necessity for commencing trials for persons not yet tried, from the date when the order of the court occasioning the retrial becomes final.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 259-60

Section 3163(g)(1) is consistent with a present provision of S. 895 in that it requires retrial of a defendant within 180 days of mistrial, an order for new trial, or appeal. Since collateral attacks may occur years after the trial, however, we think that in cases where a new trial is ordered as the result of a collateral attack, a more flexible time limit is needed. The difficulty of reassembling evidence and finding witnesses after a long period of time requires a more reasonable time limitation. Thus, section 3163(g)(2) exempts retrials necessitated by decisions on collateral attack from the 180-day time limit, and requires in such a case that the retrial be within a reasonable period.

Editor's Note

Material related to a suggested provision about computation of periods of time is reproduced as part of the history of section 3172.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 49

The commentary on this provision in the draft report was virtually identical to the commentary at pages 33-34 of the 1974 Senate committee report, set forth below.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 33-34

Subsection 3161(e) provides for time limits where there is a mistrial or where the defendant succeeds in collateral attack or appeal. As a general matter the provision requires that if the Government decides to retry the defendant in any of these situations the time limits begin to run on the date that the order occasioning the retrial becomes final.

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*Section 3162 in the department's proposal provided for "exclusions and exceptions."

Although there was little disagreement among witnesses appearing before the Subcommittee on Constitutional Rights as to the wisdom of commencing time limits with the date of the order giving rise to the retrial, there was controversy over whether 60 days, as provided in S. 895, was a sufficient amount of time. The Justice Department contended that 60 days was insufficient time to prepare for a retrial after successful collateral attack, which could come years after the original trial. The section as it appears in S. 754 draws a distinction between cases of retrial following declaration by a trial judge of a mistrial or an order by the trial judge for a new trial; and cases where there is a retrial following a collateral attack or appeal. In the former case the speedy trial period is 60 days while in the latter case the period is also 60 days, except that the period may be extended if unavailability of witnesses or other factors resulting from the passage of time make trial within 60 days impractical. This dichotomy recognizes the difficulty of preparing a new case after successful collateral attack but would not allow inordinate delay where retrial is contemporaneous with the original trial as in a declaration of mistrial by the trial judge.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 200

At page 3, line 15, amend section 3161(e), after the comma and before the word "within", insert the following: "the trial shall commence" and also make the same identical insertion on line 18 of page 3 after the comma and before the word "within."

Comments

The proposed language "the trial shall commence", is proposed for the sake of clarity.

Materials from the History of the 1979 Amendments

1979 Justice Department Bill § 4

The department proposed an amendment to section 3161(e) that ultimately became, with minor amendments, section 3161(d)(2). The last two sentences of the proposed amendment were as follows:

> The periods of delay enumerated in section 3161(h) shall be excluded in computing the time limitations specified in this section. The sanctions of section 3162 are applicable to this section.

1979 Senate Committee Report 31

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows: . . . .

> (3) assuring necessary flexibility where a defendant is to be retried following the dismissal of an indictment, which is reinstated following appeal, or where he is to be retried following other appeals, declaration of mistrial or order for new trial . . . .

1979 Senate Committee Report 32-33

Section 3 amends § 3161(d) to reflect the Justice Department's proposal concerning the trial upon indictments dismissed by the trial court and subsequently reinstated on appeal. The only difference is that the time limits [*sic*] for such trial in the substitute is seventy days in order to make that limit consistent with the amendment to section 3161(c) contained in section 1.* However, the Committee amendment, like the Department's bill, permits the Court to extend the trial date up to 180 days, if passage of time or other factors make the shorter limits "impractical."

This amendment clarifies existing law and assures that, in the case of an indictment which is dismissed by the trial court but reinstated upon appeal, the time limits are the same as those under the Act when the defendant successfully secures a new trial on appeal. The amendment also specifies that the periods of excludable delay and the dismissal sanction are applicable, and make [*sic*] similar conforming amendments to § 3161(e).

18 U.S.C. §§ 3161(f), (g)

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

Derivation

First appeared in 1972 Senate subcommittee bill, § 3161(b)(1)(B) (p. 296). This provision made the time limit to trial from arrest, service of summons, or indictment 180 days for the first twelve-month period following the effective date, and 120 days for the second twelve-month period.

1974 Senate committee bill, §§ 3161(f), (g) (pp. 312, 313). These provisions were in substantially the same form as those that appear in the statute, except that the time limits for the third twelve-calendar-month period were the same as those for the second period—45 days to indictment and 120 days to trial. In addition, the committee bill referred to "the time limit imposed by subsection (b)" and "the time limit imposed by subsection (c)" without describing those limits.

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*So in original. Should refer to section 2.

1974 House subcommittee bill, §§ 3161(f), (g) (pp. 338, 339). Changed the time limits for the third twelve-calendar-month period; added the phrase "with respect to the period between arrest and indictment" in subsection (f), and the phrase "with respect to the period between indictment and trial" twice in subsection (g).

1974 House committee bill, §§ 3161(f), (g) (pp. 338, 339). Changed "indictment" to "arraignment" in the above-quoted phrase in subsection (g); made corrections in cross-references.

No House floor amendments.

1974 act, §§ 3161(f), (g) (p. 376).

Not amended in 1979.

There were no similar provisions in the ABA standards.

Materials Addressed to Original Ervin Bill

Testimony of Senator Charles H. Percy, 1971 Senate Hearings 66-67, 72

Two basic philosophical considerations must shape our solutions—the rights of the accused and the rights of society at large. But we also must be cognizant of the practical limitations of our court system. It is because of the constraints imposed by our court system that I am today suggesting that we define a speedy trial as one which takes place within 180 days. Mr. Chairman, I realize that in the bill you introduced and that I have co-sponsored established the limit of 60 days [*sic*]. I am simply suggesting that we make a modification there. I feel certain that when you introduce a piece of legislation such as this, it is not set in concrete, but is introduced for the purpose of orbiting an idea and testing it out, and in the best way that I could I have sought to test the full content of this bill against some of the best constitutional minds and jurists that I could find in the State of Illinois.

They are very enthusiastic about the principles of the bill, but they point out some of the practical problems, and that is why I have seen fit to suggest the 180-day proposal.

Though 60 days is certainly a desirable goal, we must frame our solutions in immediately achievable language, which could be modified when new conditions warrant it.

Because of recent Supreme Court decisions, the sixth amendment is now applicable to the States through the due-process clause of the 14th amendment. Thus, any definition we legislate as to what constitutes a speedy trial would have an effect on the State courts, as well as the Federal courts. In many courts, a 60-day time limit would be impossible to meet. I believe that a 180-day limit would give our courts more flexibility and represents a realistic goal.

By setting a 180-day limit, we can insure that this legislation will not be flouted because its language cannot be met. A 60-day requirement would result in the unnecessary dismissal of many cases, and courts would have a loophole in excusing themselves from strict adherence to the principle of speedy trial. In my opinion, the alternatives I am suggesting this morning would establish a procedure that could be achieved immediately on the Federal level, and imitated on the State level. Rather than being circumvented, the dictates of the Constitution and the intent of Congress would be realized.

. . . .

Mr. BASKIR. Just one question. What would you think of a provision in the bill that started off with 180 days as a limit and that later reduced it to 120 days, and that ultimately, as the courts became experienced, decreased this time to 60 days?

Senator PERCY. Very good, indeed. I think that would be a considerable improvement, rather than leaving it at 180, because I am not convinced that that limit would continue to qualify as a "speedy" consideration. To initiate an incentive system to permit the gradual reduction of the backlog, working it down to where it really does mean a speedy trial, we would approach the 60 day limit. Today, it is impractical, but I think an incentive system toward it would be very effective.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 113

Without attempting to be exhaustive, one of the principal problems that the United States Attorneys would face if the bill were enacted in its present form is an overwhelming number of demands for trial on the part of defendants for purely tactical reasons. Our present system of criminal justice presently depends on a substantial number of guilty pleas from defendants in order to keep abreast of the caseload of the courts. This is not an indictment of the system at all, for it has been generally recognized that guilty pleas, frequently entered as the result of agreement with the prosecution to reduce the offense charged, have an entirely legitimate place in the administration of the criminal law. Though the percentage of guilty pleas has dropped in recent years, the vast majority of all convictions—indeed, 85 percent of the convictions in the federal system—still result from plea rather than trial. [Footnote omitted.] The sudden imposition of a time limit which is both inflexible and extremely short may well lead to a substantial reduction in the number of guilty pleas, not because the defendant does not have every reason for pleading guilty, but because he may recognize that by demanding a trial, he may well be the beneficiary of the mandatory dismissal provided for under S. 895. If enough defendants took the opportunity to demand trial, even though under other circumstances they would have pleaded guilty, the dramatic increase in demand for judicial manpower would itself prevent the prosecution and the judiciary, acting in the best of faith and with the greatest of diligence, from complying with the mandatory time limit.

The specter of such a mass dismissal with prejudice of criminal charges is one which I am confident this Subcommittee, no less than the Department, would abhor. I would be less than honest, though, if I said that I felt that this possibility is one which should entirely prevent the imposition of any mandatory time limit followed by dismissal with prejudice. I think that such a probability or even a possibility, however, does counsel that adequate exceptions be made to the prescribed period of time to cover cases of manifest injustice—along the lines suggested by Chief Judge Albert Lee Stephens of the Central District of California when he testified before this Committee; that the time limit ultimately determined upon be not unduly short; and that it be imposed in stages in order that the system may have a reasonable period of time to adjust to it on a graduated basis. I believe that Senator Percy's testimony before the

Subcommittee suggested some sort of a staged imposition of the time limit, and the Department heartily concurs in this general approach.

Testimony of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 119-20

Mr. Baskir. I guess the Department is concerned with respect to mandatory dismissal because you are afraid that sudden time limits would result in mass dismissals. I wonder how you would feel if the bill were constructed in such a manner that first, there was a period of time between enactment and the effective date and second, there was a requirement that the operating plans of each of the districts be created and submitted before the time limits were effective and third, there was a provision which permitted a district unable to meet the limit because of problems beyond its control to have additional time, and finally, the time limits applied in stages so that over a period of time you came down from a fairly generous rule of, let's say, 180 days to the ultimate goal of 60 days? Do you think there would be the problem of sudden dismissal?

Mr. Rehnquist. It would certainly be substantially alleviated. I honestly feel we couldn't say what the problems would be until we saw the system in action. All you can do is hope that they would not be too substantial.

Mr. Baskir. Certainly if Congress enacted a bill on January 1 that flatly said every trial should be held in 60 days, there is no question that you would have dismissals in those 29,000 or 28,000 cases you mention. But a bill that approached the problem reasonably, slowly, with plenty of opportunity to prepare for the time limits, I suspect, would reduce the mandatory dismissal to a few isolated cases where it was proper.

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34 1 (Sept. 30, 1971)

Mr. President, my amendment . . . would make the statutory trial period more realistic and would provide reasonable incentives to insure the cooperation of defense counsel. It is quite apparent from a review of the speedy trial case law that the Constitution does not mandate a 60-day period for speedy trial. This amendment would adjust the statutory period for trial from 60 days to 4 months. I believe that it would be an unreasonable burden on our criminal justice process and would hinder the cause of justice if we enact at this time a 60-day trial period enforced by dismissal. It would be substantially more equitable to society and immensely more wise to adjust the period to a shorter time later than to adopt a short period now, penalize society for violations which could prove to be unavoidable, and then be forced by an outraged public to lengthen the trial period to a reasonable time. I believe the adjusted period speaks for itself and is essential to the ultimate success of S. 895.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 251

[W]e believe that the provision for mandatory dismissal of cases not disposed of within 60 days posits a period of time which is unrealistically short. Whatever might be the case if the Congress were to provide sufficient resources and facilities to the criminal justice system to allow the attainment of a 60-day goal, we think that such a period is presently more of a desirable goal than a realistically attainable achievement. We cannot with any reasonable degree of accuracy even project the needs for manpower, resources and facilities which would have to be provided to comply with the 60-day time limit within the nationwide scope of the federal criminal justice system. A recent attempt to impose a 60-day time limit on the Florida criminal justice system has led to unacceptable and, what is more important, unjust results. Therefore, we propose that a 180-day provision is adopted instead of the 60-day time limit. Concurrently we would provide that persons who are continuously incarcerated prior to trial be either tried within 90 days or else be conditionally released from pretrial custody.

This basic approach was adopted by speedy trial rule now in effect in the Second Circuit. A similar rule has been proposed for the Eighth Circuit. We do not suggest that the 180-day period necessarily be regarded as fixed for all time. But, in line with Senator Thurmond's remarks in the Record of September 30, 1971, we believe that it would be substantially more equitable to adjust the period to a shorter time later than to adopt a short period now, penalize society for violations which could prove to be unavoidable with available manpower, and then be forced to lengthen the period to a more reasonable time.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 48

Section 3161(b)(1) has been divided by the committee into two subparagraphs, 3161(b)(1)(A) and 3161(b)(1)(B). The latter subparagraph provides for a phase-in of the 60-day time limits. For the first year following the effective date of the legislation, the time period would be 180 days, 120 days for the second year, and the 60-day period would be imposed at the beginning of the third year. This subparagraph should be read along with section 3163 of the bill, as amended, which would delay the effective date of the chapter until 1 year after enactment.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 166

The following text was included in an amendment whose principal purpose was to provide separate pre- and post-indictment time limits; the proposed subsection (c) contained a 60-day time limit to trial from indictment or information:

(f) Notwithstanding the provisions of subsection (c) of this section, for the first twelve calendar month period following the effective date of this chapter as set forth in section 3163(b) of this chapter, the time limit imposed by subsection (c) of this section shall be one hundred and eighty days, and for the second such twelve-month period, such time limit shall be one hundred and twenty days.

Discussion of Proposed Amendments in Statement Submitted for the Record by Daniel J. Freed, 1973 Senate Hearings 157

Amendment #1 proposes (a) that the ultimate time limits in the statute be accomplished by reducing lengthier permissible limits at the outset, in stages, over a period of seven years; and (b) that gradually increased pressures for compliance with each particular set of limits be imposed during the early years. Amendment #2 proposes that the single time limit in Section 3161 of S. 754—covering arrest or indictment until trial—be replaced by three separate limits: (a) arrest to indictment, (b) indictment to trial and (c) conviction to sentence.

Specifically, under these amendments, the initial and ultimate time limits would be as follows:

I(i). They would not be operative at all during the first year after enactment, under the effective date provision in Section 3163, except for the interim limits defined in Section 3164, which would remain unchanged.

I(ii). They would prescribe for the period from *arrest to indictment*
- (a) 60 days in year 2.
- (b) 45 days in years 3 and 4.
- (c) 30 days beginning in year 5.

I(iii). They would prescribe for the period from *indictment to trial*
- (a) 180 days in year 2.
- (b) 120 days in years 3 and 4.
- (c) 60 days beginning in year 5.

I(iv). They would prescribe for the period from *conviction to sentencing*
- (a) 45 days in year 2.
- (b) 30 days in years 3 and 4.
- (c) 21 days beginning in year 5.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 34-35

Subsection 3161(f) provides that the 30-day arrest to indictment time limit required by Subsection 3161(b) will not take effect immediately upon enactment. Instead, it will be phrased in, along with the sanctions for failure to comply with the time limits, over a seven year period. During the second year after enactment, the arrest to indictment time limit will be 60 days. During the third and fourth years after enactment, the time limit will be 45 days. Thereafter, the 30-day time limit specified in Subsection 3161(b) will be in effect. . . .

During the phase-in, provided by this subsection, the time limit which will apply in any particular case will depend upon the time limits in effect when the arrest takes place. If the arrest takes place when the 60-day time limit is in effect then the 60-day limits will apply regardless of whether new limits go into effect for other cases in the interim.

Subsection 3161(g) provides that the 60-day indictment to trial time limit required by Subsection 3161(c) will not take effect immediately upon enactment. The 60-day indictment to trial time limit will also be phased in over a seven year period. For the second year following enactment, the time limit will be 180 days. For the third and fourth years the time limit will be 120 days. For the fifth year and thereafter the time limit will be the 60 days. However, the accompanying phase-in sanctions will not make the dismissal sanction plus limitation on reprosecution mandatory until the seventh year. . . .

Subsection 3161(f) and (g) are the result of much discussion and compromise concerning the time necessary for achieving compliance with the mandatory speedy trial time limits contemplated by S. 754.

. . . .

During the phase-in provided by this subsection [g], the time limits which will apply to any particular case will depend upon the time limits in effect at the time the indictment or information is filed against the defendant. If the indictment or information is filed when the 180-day limits are in effect then the 180-day limits will apply regardless of whether new limits go into effect for other cases in the interim.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 31-32

Sections 3161(f) and (g) provide for the phasing-in of time limits between arrest to indictment and arraignment to trial. S. 754 provides for a seven-year phase-in period with the time limits of 30 days between arrest and indictment and 60 days between indictment and trial becoming effective in the fifth year after enactment. Year six and seven in the Senate bill serve as a phasing-in period for the dismissal sanction. Because the Committee makes the sanction of dismissal with prejudice effective in the fifth year, years six and seven are no longer necessary.

With respect to the time limits during the phase-in period, the only difference between S. 754 and H.R. 17409 is that the time limits in the fourth year after enactment between arrest and indictment and indictment and trial have been reduced from 45 days to 35 days and from 120 days to 80 days, respectively. The Senate bill provides identical time periods for the third and fourth years after enactment. The Committee believes that these identical time periods possibly could result in the maintenance of the status quo during the fourth year. The Committee is of the opinion that each year of the phase-in should result in gradual improvements in reducing the time period between arrest and trial.

1974 House Committee Report 40

The following language appeared in commentary on section 3165(e):

The words "calendar month period following enactment of this Act" shall be construed to mean the first full month following the month in which the bill is enacted. For example, should this bill be enacted on December 10, the first calendar month would be measured from January 1.

Materials from the History of the 1979 Amendments

Remarks of Senator Joseph R. Biden, Jr., Initial 1979 Senate Floor Debate, 125 Cong. Rec. S8011 (daily ed. June 19, 1979)

Unless this amendment is enacted into law, prior to July 1, the immediate consequences would be as follows:

As to persons arrested or served with a summons prior to July 1, the Government would have 30 calendar days, plus applicable excludable delays, after July 1 within which to file an information or indictment against them.

As to persons against whom indictments or informations are filed prior to July 1, the Government would have 60 calendar days, plus applicable excludable delays, after July 1 within which to bring them to trial.

As to all other cases commenced by arrest, summons, indictment or information after July 1, the same restrictions would apply.

Failure in any of the above instances to observe the specified time periods would enable the defendant to move for dismissal of the charges or indictment or information and, if the defendant meets his burden of demonstrating that his indictment or trial was delayed outside the time limits of the act, the court would be required to grant the motion. Whether or not the prosecution could be reinstituted rests solely within the control of the court in deciding whether to dismiss with or without prejudice, using in its determination factors set forth in the act.

18 U.S.C. § 3161(h), Introduction

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

Derivation

Mikva bill, § 3161(b) (p. 280): "The following periods shall be excluded in computing the time for trial:".

Original Ervin bill, § 3161(c) (p. 288). Minor language changes.

1972 Senate subcommittee bill, § 3161(c) (p. 298). No change.

1974 Senate committee bill, § 3161(h) (p. 313). Recast the provision in its final form, reflecting the Senate committee bill's introduction of separate pre- and post-indictment time limits.

1974 House subcommittee and committee bills, § 3161(h) (p. 339). No change.

No House floor amendments.

1974 act, § 3161(h) (p. 376).

Not amended in 1979.

ABA standard 2.3 provided for the exclusion of time in computing the time for trial.

Editor's note: Language in sections 3161(d)(2), 3161(e), and 3164, introduced by the 1979 amendments, makes the exclusion of periods of delay applicable to the time limits set forth in those provisions.

Materials Addressed to Original Ervin Bill

Letter to Other Senators from Senator Ervin, July 8, 1970, at 1971 Senate Hearings 158

S. 3936 is designed to make effective the Sixth Amendment right to a speedy trial in Federal criminal cases and to assure the effective application of the law to those guilty of crime. It requires each Federal District Court to establish plans for implementation of the bill's objective of setting trials within 60 days of the date of an indictment or information. Only delays required by concurrent proceedings or absolutely necessary to secure a fair trial are permitted under the bill.

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 5, between lines 12 and 13, insert the following:

> "(d) All periods of delay excluded under subsection (c) of this section shall be set forth in writing in the record of the case. All requests for continuances shall be by sworn statement by the prosecutor, or by the defense counsel and the accused.".

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34141 (Sept. 30, 1971)

The additional language at the beginning of subsection 3161(c) [*sic*] is designed to tighten up the procedure for the determination of excludable delays.

Editor's Note

Material related to a suggested provision about computation of periods of time is reproduced as part of the history of section 3172.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 21

The bill does more, of course, than merely impose prosecution limits on the Federal criminal trial. It has carefully constructed exclusions and exceptions which permit normal pre-trial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts. The bill also accommodates complex cases which require long periods of preparation by prosecutors and defense counsel. While the bill does not automatically exclude certain criminal trials by type, it does set forth a method by which the complex case can be identified. The bill also provides for unusual circumstances which may demand exceptions to the normal time limits. In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the "ends of justice" require an extraordinary suspension of the time limits.

1974 Senate Committee Report 32-33

While the Committee has concluded that it is necessary to minimize the delays currently experienced during the arrest to indictment period, it recognizes that complexity of the grand jury process sometimes leads to unavoidable delays. For this reason, the time limits imposed by this subsection are subject to special tolling provisions as provided in subsection 3161(h). For example subsection 3161(h)(8) specifically provides that grand jury proceedings which are sufficiently complex are to be exempt from the arrest to indictment time limits.

Section 3161(h) provides other enumerated exclusions from both the arrest to indictment and the indictment to trial time limits. Most of the exclusions apply to pretrial proceedings which take place after indictment. However any exclusion of time or tolling of time limits permitted by 3161(h) would be permitted whether it occurred before or after indictment.

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 21

The time limits would be tolled by hearings, proceedings and necessary delay which normally occur prior to the trial of criminal cases.

Remarks of Representative Conyers, 1974 House Floor Debate, 120 Cong. Rec. 41774

The committee has very carefully structured into the bill nearly every conceivable type of unavoidable pretrial delay and excepted the periods of such delay from the running of the 100-day period.

Remarks of Representative Charles E. Wiggins, 1974 House Floor Debate, 120 Cong. Rec. 41778

A mechanical adherence to time limits in the processing of criminal cases would not, of course, serve the public interest. Accordingly, certain delays are excluded in computing the times prescribed. These exclusions, contained in section 3161(h) of the bill, are reasonable and comprehensive.

Materials from the History of the 1979 Amendments

1979 Judicial Conference Bill § 3

The following introductory language was proposed as part of a general revision of section 3161(h):

(h)(1) Any time limit provided herein may be extended by order of the court, on its own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the court sets forth in the record of the case, either orally or in writing, reasons consistent with this subsection for granting an extension of the duration ordered.

(2) Extensions may be granted by the court to accommodate delays in the filing of an indictment or information[, in the arraignment of a defendant,]* or in the commencement of a trial or retrial reasonably necessitated by—

Section-by-Section Analysis of 1979 Judicial Conference Bill, Submission of Administrative Office of the U.S. Courts, 1979 Senate Hearings 733-34

Section 3 would amend 18 U.S.C. § 3161(h) to eliminate the automatic exclusion of time in computing the time in computing the time limits [*sic*] and substitute judicial discretion to extend any time limit upon a finding that such an extension is necessitated by one or more of certain enumerated events. It would also repeal section 3161(i).

Under present law, the occurrence of certain events serves automatically to extend the time limits (through the "exclusion" device), with the length of the extension being equal to the duration of the excludable event. The proposed amendment contains a similar enumeration of events, but breaks the link between the duration of the event and the length of the extension. There would be no automatic extensions of the time limits; instead, extensions would be permitted only if the judge found that the event in question necessitated a delay. In such a case, however, the judge could grant an extension of appropriate length. The proposed amendment retains the present prohibition against granting an extension because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government. It also makes it clear that subsection (h) applies to the time limit for retrial and (if it is retained) the time limit for arraignment.

Prepared Statement of Judge Alexander Harvey II, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1979 Senate Hearings 63-64

The most important difference between the Judicial Conference bill and the Justice Department bill relates to proposed revisions of § 3161(h). The Justice Department bill merely redefines three of the enumerated exclusions to permit a more generous allowance of excludable time. Our approach is somewhat different. Our study of § 3161(h), which deals with excludable time, convinces us that much needless litigation will result after July 1, 1979, because of the highly technical and ambiguous provisions of this Section. Present law requires starting dates and ending dates of excludable periods resulting from various events. Extensions of time are automatic, and the exclusions permitted frequently do not provide for an extension of reasonable duration. The Judicial Conference recommends an amendment to § 3161(h) which would permit the trial court to extend the time limits to accommodate delays reasonably necessitated by the kinds of events that are now dealt with as exclusions, provided that the court makes written or oral findings stating its reasons for granting the extension.

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*Bracketed material to be included only if the separate time limit to arraignment is retained. [Footnote in original.]

Under the proposed amendment, there would be no automatic extensions of the time limits, but extensions would be permitted only if the judge found that the event in question resulted in excusable delay. In many instances, the time to trial would be less because the court would not automatically approve requests for excludable time which were not warranted. However, if delay was reasonably necessitated by one of the specified events, the judge would then grant an extension of appropriate length. This approach would be expected to avoid litigation based on highly technical grounds but would still satisfy the basic intent of the act. This proposed amendment retains the present prohibition against granting an extension because of general congestion of the court's calendar, or lack of diligent preparation, or failure to obtain available witnesses on the part of the attorney for the government. The conclusion reached by the trial court would be subject to review on appeal and the appellate court would have specific findings of the trial court before it in ruling on the matter.

An example of the type of problem which a trial judge faces in ruling on excludable time is presented by § 3161(h)(3). Subsection 3(A) permits the exclusion of any period of delay resulting from the absence or unavailability of the defendant. Subsection 3(B) provides that a defendant shall be considered absent when his whereabouts are unknown and when, in addition, he is attempting to avoid apprehension or prosecution or when his whereabouts cannot be determined by due diligence. If a defendant fails to appear at a preliminary hearing, arraignment or a trial, it will be necessary to determine how long he has been absent in order to determine the total period subject to the exclusion. In making a decision on the issue, the trial judge will have to determine whether the defendant's whereabouts were actually unknown, and if so, the date that they became unknown; whether the defendant's whereabouts could have been determined by the government by due diligence, and if so, the date when such determination could have been made; and whether the defendant was attempting to avoid or resist apprehension or prosecution and the date of such attempt. These findings would then have to be translated into a precise number of days of excludable time.

After July 1 of this year, much litigation of this sort can be expected for the purpose of interpreting the manner in which the § 3161(h) exclusions should be applied. The key issue when dismissals are sought will in many cases involve a determination of the excludable time properly allowable. In many instances, the contest may be whether the exclusion should be for one or two or three days, and paradoxically, each time a motion is filed before trial seeking an exclusion, further delay can be expected to result because delay resulting from hearings on pretrial motions is itself excludable. The Judicial Conference bill is designed to avoid much of this time-consuming litigation concerning excludable time. Under our suggested amendment to § 3161(h), the trial court may grant reasonable extensions of time which are necessitated by the various events set forth in the statute, and these extensions need not be measured in terms of exact days.

18 U.S.C. § 3161(h)(1)

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from any proceeding, including any examination of the defendant, pursuant to section 2902 of title 28, United States Code;

(C) delay resulting from deferral of prosecution pursuant to section 2902 of title 28, United States Code;

(D) delay resulting from trial with respect to other charges against the defendant;

(E) delay resulting from any interlocutory appeal;

(F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(G) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(H) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

Derivation

Mikva bill, § 3161(b)(1) (p. 281): "The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, examination and treatment pursuant to section 2902 of title 28, United States Code, hearings on pretrial motions, interlocutory appeals, and trial of other charges."

Original Ervin bill, § 3161(c)(1) (p. 288). Minor language changes.

1972 Senate subcommittee bill, § 3161(c)(1) (p. 298). Made changes in format; added the phrase "against the defendant" to the material dealing with trials on other charges; eliminated the references to the period during which a defendant is incompetent and the period of treatment under 28 U.S.C. § 2902 (moving them to paragraphs (4) and (5)); and added a provision stating that the exclusion for "other proceedings" is for "only such court days as are actually consumed in connection with any pretrial motion or other hearing, examination, presentation of an interlocutory appeal, or a trial with respect to another charge," and that the exclusion does not apply to periods during which matters "are under advisement or are awaiting decision."

1974 Senate committee bill, § 3161(h)(1) (p. 313). Added, to the enumerated proceedings, "delay resulting from proceedings under Rule 20 of the Federal Rules of Criminal Procedure" and "delay reasonably attributable to any period during which any proceeding concerning the defendant is actually under advisement." Deleted the subcommittee provision limiting the exclusion to court days.

1974 House subcommittee bill, § 3161(h)(1) (p. 339). Added the reference to examinations and hearings on physical incapacity and added the 30-day limitation to the exclusion for proceedings under advisement.

1974 House committee bill, § 3161(h)(1) (p. 339). Replaced "proceedings under Rule 20 of" with "proceedings relating to transfer from other districts under."

No House floor amendments.

1974 act, § 3161(h)(1) (p. 376).

Reenacted in 1979, with amendments. The House accepted the Senate provision without change. Subparagraphs (C), (H), and (I), dealing with deferral of prosecution, transportation of defendants, and consideration of plea agreements were added, and the reference to removal of defendants was added to subparagraph (G). The provision for exclusion of "delay resulting from hearings on pretrial motions" was changed to read, "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Minor language changes were made in other subparagraphs, and all but the first two subparagraphs were redesignated.

ABA standard 2.3(a) was similar to the provision in the Mikva bill.

Materials Addressed to Original Ervin Bill

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35

In Section 3161(c)(1), relating to periods of delay to be excluded from computation of the 60 day period, it should be made clear that only delay from time actually spent in pretrial hearings, presentation of interlocutory appeals, and trial with respect to other charges should be excluded, and not time in which such matters are awaiting decision. If a Judge takes a pretrial motion under advisement after hearing, for example, the time between the hearing and his decision of the motion should not be excluded from the 60 day period. Such motions are often held under advisement for long periods, and extension of the 60 day limitation for such a purpose would thwart the purpose of the limitation.

"Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 71

Section 3161(c)(1), lines 16, 17 and 18 ["any period of delay resulting from hearings on pretrial motions, interlocutory appeals, or trials with respect to other charges"], are vague and subject to misinterpretation.

Testimony of Bernice Just, 1971 Senate Hearings 88

The language beginning on line 12 of page 3 providing for the exclusion of time for competency examinations could lead to continuation of the protracted delays cited above, unless fair and reasonable limits are imposed. A recommendation adopted by the Judicial Conference of the District of Columbia Circuit specifies that the court's order for a mental examination should designate a maximum period of hospitalization of 30 days, with the possibility of extension contemplated. We would suggest limiting such extension to a maximum of 30 days.

"Additional Amendments to S. 895," Appendix A to Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 147-48

On page 3 line 17:

The term delay "resulting from hearings on pretrial motions" is ambiguous. It fails to describe the beginning and ending of the excluded period. Does it mean from the date of filing the motion to the date on which the court issues its decisions? That seems excessive. Does it mean "court days actually consumed in hearing a motion"? If so, the language should say that. Since trial preparation can ordinarily proceed despite the pendency of motions, clarifying language should be added to exclude only those days necessarily consumed by the pendency of a defense motion which precludes further preparation for trial. Whether pretrial motions as should [*sic*] be included as a basis for extending the trial limits is an issue raised by the Illinois statute (Code of Criminal Procedure 38 § 103-4). It excludes, from the trial limit period "delay occasioned by the defendant, by a competency hearing, or by an interlocutory appeal."

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 254

Proposed section 3161(c)(1) provides that certain periods of delay shall be excluded from the computation of the 60-day period. The proposed language uses the phrase "any period of delay resulting from other proceedings." If a judge takes a motion under advisement, it is not certain that such a delay would be excluded from the 60-day period. We think the statutory language should be more specific in order to avoid litigation concerning the meaning of this provision.

Section 3161(c)(1) also specifies that the "proceedings" must be "concerning the defendant." As previously indicated, a fair amount of delay results in certain cases where witnesses who are needed for a grand jury investigation of a defendant refuse to testify, and certain steps have to be taken in order to compel their testimony. In some instances, these witnesses take appeals from contempt citations and a considerable period of time is spent disposing of such cases before the grand jury proceeding can continue. In a strict sense, these matters involving witnesses are not "concerning the defendant." We note, of course, that our provision making the date of arraignment the commencement of the period, would solve this problem also.

Section 3161(c)(1) goes on to specify certain types of delays which are to be excluded from the 60-day time limitation. The proposed language makes clear that these delays are included in the list of excludable delays, but that the list is not limited to those delays. We believe that there should be a greater specificity in the enumeration of exclusions in order to avoid litigation for purposes of construing this section. For instance, it is noted that with reference to the competency question, section 3161(c)(1) speaks of a delay resulting from an "examination and hearing." With reference to pretrial motions, the bill speaks of a delay resulting from "hearings" and with respect to other charges only the delay attributable to "trials" is excludable. With respect to NARA, the statute exempts delays resulting from an "examination and treatment." It seems obvious that if the principle of *ejusdem generis* is applied, certain difficulties would occur. Particularly with regard to the clause, "trials with respect to other charges", the meaning of the proposed language is not certain. It could be inferred that a delay attributable to interlocutory appeals with respect to other charges, or to pretrial motions with respect to other charges, would not be excludable. Further, it could be argued based upon this phraseology that the exceptions contained in section 3161(c)(1), for "trials with respect to other charges", pertain only to delays involving the particular case in which the defendant moves to dismiss. With respect to delays resulting from "other charges" only the delay attributable to a trial would be excludable in any other case. This myriad of possible problems with the section make its amendment desirable.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261

[§ 3162(a)](1) Any period of delay occasioned by other proceedings concerning the defendant, including but not limited to proceedings for the determination of competency, pretrial motions, interlocutory appeals, proceedings with respect to other charges against the defendant including proceedings regarding charges severed, and the period during which such matters are *sub judice.*

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 257-58

Section 3162(a)(1) is similar to section 3161(c)(1) of S. 895 and a similar provision of the Second Circuit Rules. As amended, this section would exclude delays caused by proceedings concerning other charges against the defendant as opposed to "trials with respect to other charges." The defendant's presence for competency hearings, motions to suppress, etc., with respect to other charges are [*sic*] potentially as great a source of delay as the actual trial on the other charges. We think that this amended section substantially cures the problems in the S. 895 provision.

This section also excludes any period of delay engendered when such matters are taken under advisement by the court. The existing void is cured by the addition of the words "*sub judice.*" Similar language can be found in the Second Circuit Rules.

Letter to Senator Ervin from Judge George L. Hart, Jr., June 22, 1970, at 1971 Senate Hearings 170

Referring to the last 2½ lines of this Section which reads as follows: "and any period of delay resulting from hearings on pre-trial motions, interlocutory appeals, or trials with respect to other charges."

I think that it is clear "with respect to other charges" refers only to the matter appearing after the comma, that is, trials with respect to other charges, but having some knowledge of defense counsel, I suggest that until settled by a Court of Appeals some will argue that the words "with respect to other charges" applies also to hearings on pre-trial motions and interlocutory appeals in the case in question. To avoid this it might be well to re-word this Section to make it even more clear that the words "respect to other charges" relate only to other trials.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 50

With two exceptions, the commentary on this provision in the draft report was virtually identical to the commentary at pages 35-36 of the 1974 Senate committee report, set forth below (p. 104). The first exception involved the subcommittee's language limiting the exclusion to "court days." In the 1972 draft report, the fourth paragraph of the excerpt from the 1974 report did not appear. The last two sentences of the third paragraph treated the "court days" limitation as a current recommendation; they stated that the section "would exclude" only court days, but that "[i]t is possible, however," that an "ends of justice" continuance could be used. The second exception was that the last sentence of the third paragraph in the 1972 draft cited a "unique or unusually complex pretrial hearing" as a possible basis for an "ends of justice" continuance, rather than a "unique question of law or unusually complex pretrial hearing."

1972 Draft Senate Committee Report, at 1973 Senate Hearings 51

Reference is made to the exclusion of periods of time relating to examination for mental incompetency in subparagraph 3161(c)(1)(A) as a "proceeding concerning the defendant". That provision and subparagraph 3161(c)(1)(B) provide for the exclusion only of "court days" actually consumed in competency hearings and a reasonable number of hospital days actually consumed by physicians in mental examination. However, once the defendant is determined incompetent the only consideration is his return to competency. The length of time required for him to do so obviously should not be the basis of a speedy trial claim under the bill. Therefore, a separate exclusion has been added to subsection 3161(c).

. . . Reference is made to the exclusion of periods of time relating to examination for addiction pursuant to NARA in subparagraph 3161(c)(1)(A) as a "proceeding concerning the defendant." That provision and subparagraph 3161(c)(1)(B) provide for the exclusion only of "court days" actually consumed in hearings on the issue of addiction and a reasonable number of hospital days actually consumed by physicians in physical examination. However, once the defendant is determined to be an addict and falls within the eligibility provision of NARA, he is covered by that act and speedy trial is much less relevant. Therefore a separate exclusion has been added to subsection 3161(c).

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 168

Senator McClellan suggested that there be added, at the end of the list of enumerated proceedings, "(vi) delay resulting by reason of any of the aforementioned matters being under advisement." Clause (1)(B) in the subcommittee bill would have been amended so that it would read as follows:

> (B) With respect to any delay referred to in clause (1)(A) of this subsection, only such period of delay as is reasonably attributable to any period during which any of the aforementioned matters under clause (1)(A) are under advisement, or to any such proceeding involving any pretrial motion or other hearing, examination, presentation of an interlocutory appeal, or a trial with respect to another charge shall be excluded, and in no event shall any period of delay which occurs while any of the aforementioned matters under clause (1)(A) are awaiting decision be so excluded.

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 165

Under S. 754, as now drafted, the provisions of the bill exclude from the sixty day rule delay resulting from pretrial hearings and interlocutory appeals [§ 3161(c)(1)(A) (iv) and (v)]. The delay, however, is calculated in "short time" [§ 3161(c)(1)(B)].*

This amendment which [*sic*] would permit this delay to be calculated on the basis of "delay reasonably attributable" to such purposes—not limited to "court days" and not excluding time "under advisement".

It can be argued that there is a due process need to give the courts adequate time to consider the questions of constitutional rights that arise in pretrial proceedings. It ought not be necessary to achieve speedy trial to give up due consideration of other equally important rights.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 114

In addition, we note that section 3161(c)(1)(A) would exclude from the computation of the 60-day period, certain periods of delay, but section 3161(c)(1)(B) would provide that in no event shall delay be excluded which occurs while certain pretrial matters and motions are under advisement or awaiting decision. This provision appears to dictate the speed with which the courts are to resolve various matters, and in those cases where the 60-day limit is close at hand, a judge will have no time to weigh the important issues requiring careful consideration and analysis. Will a defendant be deprived of due process if a judge must, because of the time limits, summarily rule on motions which the defense raises? Such a result may well constitute an unwarranted intrusion of the legislature into a proper function of the judiciary and may raise questions concerning the separation of powers.

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*Brackets in original.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 115

A defendant arrested in, for example, California on a Florida indictment, may initially indicate a desire to plead guilty pursuant to rule 20 of the Federal Rules of Criminal Procedure. He may thereafter refuse to enter a plea once the transfer papers have arrived. At that point, the defendant will be required to appear for arraignment and trial in Florida, but several weeks of trial preparations will have been lost in the interim.

Testimony of U.S. Attorney James R. Thompson on Behalf of the Department of Justice, 1973 Senate Hearings 126-27

[T]he bill . . . excludes from the time limit of the statute only that period which deals with the court days consumed by hearing pretrial motions, but it does not exclude time under advisement. It is sort of a flabbergasting provision because in the criminal justice system you could have a pretrial motion that could take 10 days to hear as a matter of evidence, but an hour to dispose of by the judge, and conversely, you could have a hearing in which the evidence only took an hour to present but the issue was so complex that the judge would have to spend a week or 10 days or 2 weeks with the motion under advisement before he could decide it. And similarly, where the bill makes reference to interlocutory appeals as being exempted from the time limit, as I read the bill, it would only exempt that period of time which it took counsel to argue the interlocutory appeal and not the time it took the court to decide it. So I think the bill does not treat the whole area of pretrial motions, which is what ought to be handled.

Letter to Mark Gitenstein, Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Richard A. Hauser, Attorney-Advisor, Office of Criminal Justice, U.S. Department of Justice, June 12, 1973, at 1973 Senate Hearings 196

The Deputy Attorney General noted in his testimony that if a defendant chooses to dispose of his case pursuant to Rule 20 and then refuses to plead guilty after the arrival of the transfer papers, several weeks of trial preparation will be lost, while the defendant is returned for arraignment and trial in the indicting district.

This situation could be remedied by amending §3161 to provide an exclusion for the time consumed by an aborted Rule 20 proceeding. I would suggest that language along the following lines be added to §3161(c)(1)(A): "(vi) delay resulting from proceedings under Rule 20, *F.R. Cr.P.*"

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

(1) Delays caused by proceedings relating to the defendant such as hearings on competency to stand trial, hearings on pretrial motions, trials on other charges, and interlocutory appeals;

1974 Senate Committee Report 35-36

Subparagraph 3161(h)(1) allows the court to exempt from the time limits, time consumed by "proceedings concerning the defendant." This provision, when considered with all the enumerated exclusions from the time limits contained in 3161(h), assures that the time limits do not fall too harshly upon either the defendant or the Government. Subparagraph 3161(h)(1) allows the defendant to take advantage of certain procedures on his own motion such as mental competency hearings or motions to suppress evidence without penalizing the Government for the resulting delay.

At the suggestion of the Justice Department, the committee has enumerated in the text of the bill examples of what is meant by "proceedings concerning the defendant." The list is not intended to be exhaustive. It is representative of procedures of which a defendant might legitimately seek to take advantage for the purpose of pursuing his defense.

Also at the suggestion of the Justice Department, new language was added by the subcommittee to subparagraph 3161(h)(1) to resolve an ambiguity in the original language of S. 895. Subparagraph 3161(h)(1) of S. 895 as introduced did not clarify whether an exclusion for a "proceeding concerning the defendant" includes just the period consumed by the hearing or also includes a period during which it is under advisement. Under that provision a pretrial motion which only consumes a few hours in hearing could exclude days or even weeks from the time limits while the motion is under advisement. To meet this problem, the latter half of the section as amended, 3161(h)(1)(B), would have excluded only "court days" actually consumed in a proceeding covered by the subparagraph. It was intended, however, that a unique question of law or unusually complex pretrial hearing could be the basis for an "ends of justice" continuance (see discussion of 3161(h)(8), p. 38ff).

However, the committee dropped the subcommittee's language on "court days." Under the committee amendment delays "reasonably attributable to delays during which a matter is actually under advisement" may toll the time limits. It was not the intent of the committee in adopting this amendment to give a blanket exception to matters under advisement for the time excluded must be "reasonably attributable" and the matter must be "actually under advisement." Therefore the judge must be actually considering the question, for example, conducting the research on a novel legal question.

It is intended that an examination for mental competency or for narcotics addiction pursuant to the Narcotics Addict Rehabilitation Act (NARA), section 2902 of title 28 of the United States Code, should be treated the same as the hearing on these issues. Therefore, a reasonable amount of time actually consumed while the defendant is under physical or mental examination shall also be excluded in computing time. Of course, it would still be inappropriate to exclude time spent at a hospital after the examination is complete or as a result of unreasonable delays at the hospital awaiting examination.

1974 Senate Committee Report 37-38

Reference is made to the exclusion of periods of time relating to examination for mental incompetency in subparagraph 3161(h)(1)(A) as a "proceeding concerning the defendant". That provision provides for the exclusion of time consumed in competency hearings and a reasonable number of hospital days actually consumed by physicians in mental examination. However, once the defendant is determined incompetent the only consideration is his return to competency. The length of time required for him to do so obviously should not be the basis of a speedy trial claim under the bill. Therefore, a separate exclusion has been added to subsection 3161(h).

. . . .

. . . Reference is made to the exclusion of periods of time relating to examination for addiction pursuant to NARA in subparagraph 3161(h)(1)(A) as a "proceeding concerning the defendant." That provision provides for the exclusion of time actually consumed in hearings on the issue of addiction and a reasonable number of hospital days actually consumed by physicians in physical examination. However, once the defendant is determined to be an addict and falls within the eligibility provision of NARA, he is covered by that act and speedy trial is much less relevant. Therefore a separate exclusion has been added to subsection 3161(h).

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 200

On page 4, line 22, amend section 3161(h)(1)(i), by inserting between the words "on" and "competency" the following: "mental or physical".

Comments

The purpose of inserting the words "mental or physical" is for the sake of clarity.

On page 5, line 1, amend section 3161(h)(1)(iii), by striking the word "trials" and insert in lieu thereof the words "legal proceedings".

Comments

A defendant is often involved in hearings with respect to other charges, thus it is suggested the all inclusive language "legal proceedings" should be used in lieu of the word "trials".

At page 5, line 5, amend section 3161(h)(1)(v) by changing the semicolon to a comma and adding the following language: "and compliance with orders entered thereon".

Comments

In complex and massive cases there is often delay resulting from compliance with orders entered on pretrial motions, thus in recognition of this type of delay the above language is proposed.

Testimony of H. M. Ray, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 215

We have suggested, for example, in this language, instead of using the word "trial," you use the word "hearing" because we want it all inclusive. If he is being held in a State, maybe it's a hearing or maybe just a hearing in Federal court out there would delay it.

Prepared Statement of Ivan E. Barris, 1974 House Hearings 336

With respect to Section 3161(1)(vii),* I believe that the District Judge should be required to make a determination upon motions within 30 days after argument thereon and that, accordingly, no more than 30 days should be excluded in computing the time within which the trial of any offense must commence in relation to matters under advisement—if such a safeguard is not "built into" the [*sic*] S. 754, the purpose of S. 754 could be effectively defeated by the District Judge "sitting" on a matter indefinitely.

Testimony of Ivan E. Barris, 1974 House Hearings 340

The second amendment which I would suggest is one which is not of wide sweeping consequences, but it might plug up a loophole which I conceive exists in the present bill, and namely it is to place a restriction in section 3161(1)(vii),† which allows at the present time that the time that a particular matter is under advisement shall be excluded from the time period.

Now, I think the language which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term—"reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted in the matter under advisement is not an unreasonable period in which the district judge could act. I do not think that this would compel the judge to reach on any particular issue an improvident answer merely because he is held to a time limit of 30 days. And yet if such a provision or restriction were written into the act, it would effectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well "sit on a matter" for an indefinite period of time and thus rather effectively defeat the purposes of the bill.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 32

Section 3161(h)(1)(A) allows the exclusion of time in computing the period between arrest and trial for the examination of the defendant relating to his incapacity to stand trial. The subcommittee added the words "mental or physical" prior to "incapacity" at the request of the Justice Department for the sake of clarity.

1974 House Committee Report 32-33

Section 3161(h)(1)(G) provides for the exclusion of time during which any proceeding concerning the defendant is under advisement. The subcommittee added language which would limit to 30 days the time that each proceeding could be held under actual advisement. The amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:

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*So in original. Reference should be to 3161(h)(1)(vii).

†So in original. Reference should be to 3161(h)(1)(vii).

[Quotation omitted.]

The Committee concurs with the views of Mr. Barris and also with the Alaska speedy trial rules of court, which provides that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

1974 House Committee Report 36

Any reading of this legislation should make it clear that proceedings [pursuant to section 3161(j)] regarding a prisoner against whom charges are brought while he is serving a term of imprisonment pursuant to an earlier conviction are "proceedings against the defendant" in the same sense as provided in section 3161(h)(1), and that delay resulting from such proceedings, therefore, is excludable and tolls the time limits set forth in section 3161. It should be equally clear that the time for trial begins to run as soon as the prisoner is arraigned, which must occur within ten days either of filing of charges or the date the defendant has been ordered held to answer and has appeared, whichever happens last, as set forth in Section 3161(c). Consequently as soon as the prisoner's presence for trial on charges pending against him has been obtained, the time limits during which he must be brought to trial begin; this means that, if the prisoner does not waive his right to contest the legality of the demand for temporary custody, any time period consumed by proceedings, related to that contest is excludable from the time allowed to bring the prisoner to trial, for the reasons stated above. Similarly, if the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under section 3161(a)(2).* In addition, the Committee feels that, since the prejudice an incarcerated defendant may suffer is potentially so great, the attorney for the Government is also subject to sanction for such unreasonable delay under section 3162(b)(4). The Committee does not believe that this imposes any hardship upon the attorney for the Government since, unlike state practice in many jurisdictions where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for purposes of pleading.

1974 House Committee Report 49

Section 3161(h)(1)(F), as amended by the Committee, makes reference to proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure. Under the current version of these Rules, such proceedings are governed by Rule 20.

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*So in original. Probably should refer to section 3162(a)(2).

Remarks of Representative Conyers, 1974 House Floor Debate, 120 Cong. Rec. 41774

I would like to enumerate for my colleagues a few of those [excepted periods of delay]. First of all, in any case where there is an examination or a trial pending in another court involving the accused, the time limits are excluded and the period does not begin until such proceedings are concluded. If there are any interlocutory appeals taken, the time they conserve* is automatically excluded. For that period of time in which there are actual hearings on pretrial motions, the time period is again tolled. If there are any transfer contests involving other districts' problems, the time is suspended. If the court takes a motion under advisement, that time is subject to an exception, not, it is stated, to exceed 30 days.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777

Mr. COHEN. If I might respond to the gentleman now—I will when he offers his amendment [to lengthen the time limits]—we have provision for the complex case. The Watergate trials might be an example of it, for, clearly, that case would not be tried and cleared within the 90- or 100-day period of time. There is provision to exclude the operation of this 100-day limitation in such cases of a complex nature.

In addition to that, I think, realistically speaking, it will take into account the exclusion of the time period of this particular act to file other pretrial motions by defense counsel.

I would suggest to the gentleman from Indiana that realistically speaking there is not a defense counsel who is worth his salt who would not file every available motion, motions for discovery, and other pretrial motions in order to properly represent his client. Those periods would be excluded. So for all practical purposes we are not talking about simply 100 days. That is a minimum. In all cases I think it would go much longer because of the discovery motions, pretrial motions, and the interlocutory motions, and so on. There are some exceptional circumstances which will extend that.

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41791

Representative Cohen made the following remarks in opposing an amendment that would have added thirty days to the arrest-to-indictment time limit and thirty days to the arraignment-to-trial limit:

The gentleman from Indiana wants 60 more days in order to prepare for trial. Realistically speaking, that 60 days will add to the time inevitably to be added because of pretrial motions, pretrial discovery, so it is 60 days on top of those days, which is extending it 120 days, rather than 60. We are trying to put some discipline into our system.

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*So in original. Probably should be "consume."

Materials from the History of the 1979 Amendments

1979 Justice Department Bill § 5

SEC. 5. Section 3161(h) of title 18, United States Code, is amended:

(a) by amending paragraph (1)(A) to read as follows:

"(A) delay resulting from proceedings, including an examination, to determine the mental competency or physical capacity of the defendant;" and

(b) by amending paragraph (1)(B) to read as follows:

"(B) delay from proceedings, including an examination of the defendant, pursuant to section 2902 of title 28, United States Code;"; and

(c) by amending paragraph (1)(E) to read as follows:

"(E) delay resulting from the preparation and service of pretrial motions and responses and from hearings thereon;".

Section-by-Section Analysis of 1979 Justice Department Bill, Enclosure to Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4330 (daily ed. Apr. 10, 1979)

Section 5 amends the excludable delay provisions of 18 U.S.C. 3161(h). Amendments of 18 U.S.C. 3161(h)(1)(A) and (B) modify the current provisions to allow exclusion of delay resulting from examinations and hearings on the defendant's mental competency or physical incapacity; and from election, examination, and determination of the defendant's eligibility for treatment under the Narcotic Addiction Rehabilitation Act, 28 U.S.C. 2902. The section also adds a provision to exclude delay attendant to preparation and hearing of pretrial motions.

1979 Judicial Conference Bill § 3

The following language was proposed as part of a general revision of section 3161(h):

Extensions may be granted by the court to accommodate delays in the filing of an indictment or information . . . or in the commencement of a trial or retrial reasonably necessitated by—

(A) examinations of defendants to determine mental competency or physical capacity;

(B) examinations of defendants pursuant to section 2902 of title 28, United States Code;

(C) trials with respect to other charges against the defendant;

(D) interlocutory appeals;

(E) proceedings relating to the transfer of cases or the removal of defendants from other districts under the Federal Rules of Criminal Procedure;

(F) transportation of defendants from other districts, or to and from places of examination or hospitalization: *Provided*, That any time consumed in excess of ten days from the date of an order of removal or an order directing such transportation and the defendant's arrival at his destination shall be deemed unreasonable;

(G) pretrial proceedings of unusual complexity;

. . . .

(K) consideration by the court of a proposed plea agreement that has been entered into by the defendant and the attorney for the Government; and

. . . .

Section-by-Section Analysis of 1979 Judicial Conference Bill, Submission of Administrative Office of the U.S. Courts, 1979 Senate Hearings 734

The list of enumerated events differs from those under current law in the following respects:

1. Pretrial proceedings could justify an extension only if they were of "unusual complexity." The hearing and decision of relatively routine pretrial matters would be accommodated within the regular time limits.
2. It would be made clear that removal proceedings as well as transfer of cases could justify an extension.
3. Time required for transportation of defendants could justify an extension.
4. Time required for the court to consider a plea agreement could justify an extension.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 55

Section 5 will provide for exclusion of the time reasonably necessary for the processing of cases where the mental competency or physical capacity of the accused, or his eligibility for treatment under the Narcotic Addiction Rehabilitation Act, 28 U.S.C. 2902, is drawn in question. The current provisions of section 3161(h)(1)(A) and (B) are easily susceptible of being interpreted in an unreasonably restrictive fashion, requiring unnecessary resort to section 3161(h)(8), and resulting in possible errors or injustices, and unnecessary litigation.

Section 5 will also provide for the exclusion of all time reasonably necessary for and routinely required to make, respond to, contest and decide pretrial motions, thus avoiding unnecessary resort to and litigation under and about the exercise of authority under section 3161(h)(3).*

Opening Statement of Senator Joseph R. Biden, Jr., at Second Day of Hearings, 1979 Senate Hearings 72

[B]efore turning to the witnesses, I would like to frame what I believe to be the ultimate questions for the committee and, therefore, our witnesses today.

Phil Heymann, who appeared on behalf of the Justice Department, argues that the best solution to the speedy trial is to lengthen the time limits and narrowly construe the exclusions. Proponents of the act argue that the best approach is to leave the time limits intact and more liberally construe the exclusions as the second circuit has been doing.

Today we will hear from Judge Ward who wrote the second circuit guidelines. I understand Judge Ward will use the case that Phil Heymann used in his testimony to illustrate that a flexible interpretation of the exclusions and the present time limits will achieve the same results as the Department of Justice's longer time limits and narrow construction of the exclusion.

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*So in original. Probably should be "3161(h)(8)."

1979 Senate Committee Report 17-20

By urging the Committee to expand the basic time limits and retain only several, narrowly defined exclusions to be "strictly construed," the Department advocates a fundamental policy shift in the Act. The Judicial Conference does likewise by making the same request for expansion of the limits and preferring more general excludable delays, with "reasonable" periods to be fixed at the discretion of the court.

The Committee is troubled to find evidence which suggests that, not only is the Act being interpreted to deny it most of its inherent flexibility, it remains practically "noninterpreted."

The most instructive example arose during the course of the hearings. On May 2, to illustrate the need for an expanded arraignment-trial time period, Assistant Attorney General Heymann cited a recent Departmental case of admitted complexity which, only through extraordinary effort, was brought to trial in 95 days. He states: "The only relief is under Section 3161(h)(8)." On May 10, Judge Ward, Chairman of the circuit committee which drafted the Second Circuit's new Guidelines Under the Speedy Trial Act, approved January 16, 1979, took the example cited, applied the guidelines to the facts, and said:

> My arithmetic, for what it is worth, shows we used up 24 days. I may be a day off, but it is close. Subtract 24 from 60. By my example, using the 60-day arraignment to trial period, you have 36 days left within which that case would be tried with no need for the judge to make any (§ 3161) (h)(8) determination. And, therefore—it may sound strange—but the way I have figured it out, you would have 11 days more available than the 25 would have were the clock inexorably ticking.

The point of that example is that the principal actors in the Federal criminal justice system are, for a variety of reasons, interpreting those provisions of the Act in an unnecessarily inflexible manner. . . .

. . . .

. . . Neither hostility toward the Act nor fear of the consequences is a justifiable basis for interpretation which is so strict as to deny the spirit of it as well as its letter in application. The Committee does find, however, that some provisions of the Act, particularly with respect to excludable delays, deserve legislative clarification consistent with recommendations of the Department, the Judicial Conference and the defense bar. Moreover, existing legislative history with respect to the meaning of the exclusionary provisions and the probable frequency of their application may be unduly harsh, as a result of an overabundance of caution on the Judiciary Committees' part in reaction to contemporary expressions of hostility toward the Act.

Accordingly, the Committee amendment makes changes in several excludable time and continuance provisions to meet legitimate concerns; these changes, and their intended meaning, are expressed and explained in the next section.

The Committee must stress, at this juncture, that no amendment short of repeal and no amount of interpretive language could conceivably meet every objection and solve every problem arising from the Act's application in a practical setting. To attempt to do so would so constrict the Act as to hamstring its inherent flexibility and defeat its principal aims as a consequence. While the Administrative Office has demonstrated diligence and good faith in its efforts to guide the districts toward a reasonable application of the Act in practice, the Committee finds that, too often, the Administrative Office has erred on the side of caution. The Second Circuit has interpreted the Act and its legislative history in a creative manner which preserves its objectives and specifically addresses most of the problems which have hindered its smooth implementation, as Judge Ward's example, supra, demonstrates. After careful reading, the Committee is of the opinion that the Second Circuit guidelines are worthy of consideration by all the districts as a model for future implementation, consistent with presently-contemplated changes. The Committee invites every circuit council and district chief judge to give them the closest attention possible.

1979 Senate Committee Report 25-26

A second concern is more serious: adequate time for the consideration of plea bargains. None of the speedy trial objectives sought to be advanced by the Act is served if an innocent defendant, faced with little time to prepare his defense and a Government prepared for trial, accedes to a guilty plea to reduced charges rather than running the risk of a worse fate at trial. The same is true if a United States Attorney with a significant backlog of criminal cases decides to resort to plea-bargaining serious offenses. The most that current data shows is that cases disposed of by plea have increased slightly in the three years the Act has been in effect over the year previous to its enactment but, again, the dismissal sanction has yet to take effect. Whether the excludable delay provisions include time spent by the court in considering a plea bargain proposed to be entered into by the parties is once again, a matter of interpretation. In its recently-promulgated guidelines, the Second Circuit lists "a defendant's cooperation" as one of the circumstances in which the "ends of justice" almost always outweigh the speedy trial interests * * * (whether viewed as a circumstance 'likely to make a continuation of (the) proceeding impossible' under (§ 3161)(h)(8)(B)(i) or a separate factor."* The attendant comment says:

> It is evident that a plea agreement or an agreement to terminate the prosecution of a cooperating defendant can often not be made until well after the statutory periods have run. Consequently, an (h)(8) continuance would be most appropriate.

If Federal prosecutorial policies are changing in emphasis to reserve for trial more serious offenders, it is obviously not in the public interest to permit those who have engaged in less serious, but nonetheless proscribed, criminal conduct to "take under advisement" a negotiated plea agreement and then move for dismissal once the time to trial has expired. To the same degree public confidence in equal justice would be eroded from the incarceration of an innocent person forced to plead guilty, due to an inability to prepare his or her defense on time. Either would surely constitute a "miscarriage of justice," and, as the Second Circuit makes plain, no such result was intended. As a general matter the committee is reluctant to automatically exclude plea bargaining *per se* because the difficulty of measuring the beginning on a bonafide bargaining [*sic*] but prefers the case-by-case approach of second circuit under existing language. However, the Committee amendment would exclude automatically from the sixty-day period delay resulting from consideration by the court of a proposed plea agreement entered into by the defendant and the Government.

The most serious concern about the arraignment to trial period raised by proponents of change involves the ability of the defendant to obtain and maintain counsel of his choice and prepare effectively for trial. Not surprisingly, given palpable judicial unwillingness to interpret the Act's exclusions flexibly to date, the absence of a dismissal sanction to serve as an incentive and a Government which may be prepared to try its case when the indictment is returned, many defense lawyers have characterized the Act as the "Speedy Conviction Act." Theoretically, the defense has a maximum of one hundred days to prepare for trial, less appropriate excludable delays; however, since fewer than four in ten cases commence with arrest, most defendants would have seventy net days to prepare. Moreover, preparation time may be further limited to sixty net days, or less. The ten-day indictment to arraignment period is often eliminated by holding arraignment on the day of indictment or, when arrest follows indictment, on the date of the first appearance. At that point, the clock starts to run. If a defendant is not represented by counsel at that point, part of the preparation time must be consumed searching for representation. Given the fact that a United States Attorney can control the switch on the clock to the extent that the seventy-day maximum is begun upon indictment, the burden of preparation does not always fall as heavily on the Government.

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*Ellipsis and placement of parentheses and quotation marks in original.

If courts, feeling compelled to schedule trials immediately, are loathe to grant "ends of justice" continuances to permit adequate preparation time—and the Committee finds considerable evidence that many are—and construe automatically-excludable delays with too much inflexibility, the defendant and his counsel may shoulder an unintended and unwarranted share of the speedy trial burden. As the comment from the House Judiciary Committee's 1974 report makes clear, the expedients of speed and efficiency were not to supersede the elements of due process; "* * * (a) scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial."*

The Committee believes that the defendant's ability to retain counsel of his choice and within his means, to enjoy continuity of counsel where possible and to have diligent counsel prepared to put on his or her defense are essential and must be encouraged where to do so would not frustrate the public's interest in speedy trials and would serve the ends of justice. While it believes that the Act as written is flexible enough to permit the realization of these objectives, its legislative history placed undue emphasis on case complexity and failed to foretell the types of occurrences for which defendants should not be penalized, such as good-faith scheduling conflicts and illness. For these reasons, the Committee amendment clarifies reasonable delay for pretrial motions preparation which may automatically be excluded and sharpens the variety of factors courts may consider in deciding whether to grant "ends of justice" continuances, including the uniqueness or complexity of the case, obtaining and maintaining continuity of counsel and reasonable preparation time.

1979 Senate Committee Report 33-34

Section 4 expands and clarifies the specifically-enumerated periods of excludable time. It combines the best aspects of the Department's and the Conference's proposals. The Committee amendment leaves intact, however, both the order and the automatic application of exclusions as provided in existing law. The Conference bill would have made the application of excludable time discretionary, instead of automatic.

Section 3161(h)(1) currently provides that periods of delay consumed by the following are to be automatically excluded:

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*Ellipsis in original.

An examination or hearing to determine mental competency or physical incapacity;

An examination under the Narcotics Addicts Rehabilitation Act of 1966, as amended (28 U.S.C. 2902);

Trials of other charges against the defendant;

Interlocutory appeals;

Hearings on pretrial motions;

Transfer proceedings; and

Periods when any of the above proceedings are under advisement by the court.

The Committee amendment adds to this list three Judicial Conference suggestions concerning delays resulting from:

Deferral of prosecution under 28 U.S.C. 2902;

Transportation of the defendant from other districts and for examination or hospitalization with a rebuttable presumption that any period so consumed in excess of 10 days is unreasonable; and

Consideration of proposed plea agreements.

These amendments would clarify the language contained in existing law, pursuant to several suggestions made by the Department and the Conference,[*]

The mental examination provision would allow the exclusion of more than one examination or any proceeding (instead of one hearing); the same type of change is made for examination under Section 2902, Title 28.

The "hearings on pretrial motions" provision would be enlarged to, include, as excludable time, the entire period of time from the date of filing to the conclusion of hearings on, or other prompt disposition of, pretrial motions.[†]

The "proceedings related to transfer" provision is expanded to include the removal of the defendant from another district.

The Committee's recommended changes in the computation of excludable delays and pretrial motions practice bear some explanation. First, the language in subparagraph (F) of subsection (h)(1), the automatically excludable delay provisions, must be read together with the proposed change in clause (ii) of subsection (h)(8)(B) involving "preparation" for "pretrial proceedings". Although some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts. We suggest caution by courts in granting "ends of justice" continuances pursuant to this section, primarily because it will be quite difficult to determine a point at which preparation actually begins.

This provision and the change the committee amendment makes with respect to the automatic exclusions for pretrial motions in (h)(1)(F) is an appropriate subject for circuit guidelines, pursuant to the Committee's addition of a new subsection (f) to section 3166. Not only should such guidelines instruct courts on how to compute the starting date of preparation for complex pretrial motions, but such guidelines should also set uniform standards for motion practice. Many courts by local rule have either adopted an omnibus pretrial motions procedure, which requires consolidation of all such motions soon after arraignment, or they require the filing of pretrial motions within a specified number of days (often 10) after arraignment, although they need not be consolidated. The Committee expresses no preference but recognizes that, if basic standards for prompt consideration of pretrial motions are not developed, this provision could become a loophole which could undermine the whole Act.

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[*] Punctuation so in original.

[†] Punctuation so in original.

Finally, the section provides exclusion of time from filing to the conclusion of hearings on or "other prompt disposition" of any motion. This later language is intended to provide a point at which time will cease to be excluded, where motions are decided on the papers filed without hearing. In using the words "prompt disposition", the committee intends to make it clear that, in excluding time between filing and disposition on the papers, the Committee does not intend to permit circumvention of the 30-days, "under advisement" provision contained in Subsection (h)(1)(J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days. Nor does the Committee intend that additional time be made eligible for exclusion by postponing the hearing date or other disposition of the motions beyond what is reasonably necessary.

1979 House Committee Report 10

The committee adopts, without change, the Senate amendments to the provisions of Section 3161(h) of the act relating to exclusions and "ends of justice" continuances. Three new items are added to the enumeration of "delays resulting from other proceedings concerning the defendant" which are excludable, namely delays resulting from deferral of prosecution under the Narcotic Addict Rehabilitation Act, delays from consideration of proposed plea agreements by the court, and delays resulting from transportation of a defendant from another district or for the purposes of examination or hospitalization. Any time in excess of 10 days for such transportation is presumed to be unreasonable.

The provision of existing law relating to exclusion of periods of delay "resulting from hearings on pretrial motions" is revised to avoid an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing. The committee approves the expansion of this exclusion to "delay resulting from any pretrial motion, from the filing of the motion, through the conclusion of the hearing on, or other prompt disposition of, such motion" with the intention that potentially excessive and abusive use of this exclusion be precluded by district or circuit guidelines, rules, or procedures relating to motions practice.

1979 House Committee Report 11

Section 4 amends section 3161(h)(1) relating to exclusions of periods of delay resulting from other proceedings concerning the defendant. These changes would—

(a) Add, at the recommendation of the Judicial Conference, three new items to the enumeration of "delays resulting from other proceedings concerning the defendant" which are excludable, namely delays resulting from deferral of prosecution under the Narcotic Addict Rehabilitation Act, delays from consideration by the court of proposed plea agreements, and delays resulting from the transportation of a defendant from another district or for the purpose of examination or hospitalization. Any time in excess of 10 days for such transportation is presumed to be unreasonable;

(b) Revise the provision of existing law relating to exclusion of periods of delay "resulting from hearings on pretrial motions" to avoid an unduly restrictive interpretation of the exclusion as extending only to the actual time consumed in a pretrial hearing;

(c) Broaden the language relating to exclusions for examinations of a defendant and hearings concerning his mental or physical condition; and

(d) Expand the "proceedings related to transfer from other districts" provision to include "removal" as well as "transfer" proceedings.

18 U.S.C. § 3161(h)(2)

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

Derivation

Mikva bill, § 3161(b)(2) (p. 281). This provision was similar to the final version, but approval of the court was not required.

Original Ervin bill, § 3161(c)(2) (p. 288). Minor language change.

1972 Senate subcommittee bill, § 3161(c)(2) (p. 299). Added requirement of court approval.

1974 Senate committee bill, § 3161(h)(2) (p. 314). No change.

1974 House subcommittee and committee bills, § 3161(h)(2) (p. 340). No change.

No House floor amendments.

1974 act, § 3161(h)(2) (p. 376).

Not amended in 1979.

There was no similar provision in the ABA standards.

Materials Addressed to Original Ervin Bill

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35

In Section 3161(c)(2), the words "with the approval of the court" should be inserted after the words "written agreement with the defendant." This provision, which recognizes and encourages the deferral of prosecution pursuant to written agreement with a defendant that he will demonstrate his good conduct, is desirable. Since it has some of the elements of a plea bargain and does result in a pro tanto waiver of the defendant's right to a speedy trial, approval by the court on the record is a wise and necessary safeguard. The suggested addition would accomplish this purpose.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 51

The commentary on this provision in the draft report was virtually identical to the commentary at pages 36-37 of the 1974 Senate committee report, set forth below.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

. . . .

(2) Delays caused by deferred prosecution upon agreement of defense counsel, prosecutor, and the court for the purpose of demonstrating the defendant's good conduct;

1974 Senate Committee Report 36-37

Subparagraph 3161(h)(2) is designed to encourage the current trend among United States attorneys to allow for deferral of prosecution on the condition of good behavior. A number of Federal and State courts have been experimenting with pretrial diversion or intervention programs in which prosecution of a certain category of defendants is held in abeyance on the condition that the defendant participate in a social rehabilitation program. If the defendant succeeds in the program, charges are dropped. Such diversion programs have been quite successful with first offenders in Washington, D.C. (Project Crossroads) and in New York City (Manhattan Court Employment Project). Some success has also been noted in programs where the defendant's alleged criminality is related to a specific social problem such as prostitution or heroin addiction. Of course, in the absence of a provision allowing the tolling of the speedy trial time limits, prosecutors would never agree to such diversion programs. Without such a provision the defendant could automatically obtain a dismissal of charges if prosecution were held in abeyance for a period of time in excess of the time limits set out in section 3161(b) and (c). This section of S. 754 differs from its counterpart in S. 895. It now requires that exclusion for diversion only be allowed where deferral of prosecution is conducted "with approval of the court."

This assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 200

At page 5, lines 13 and 14, amend section 3161(h)(2), by deleting the words "with the approval of the court" and by deleting the commas.

Comments

In juvenile matters the Attorney General presently authorizes U.S. Attorneys to utilize the so-called "Brooklyn Plan" for deferred prosecution, and in some pilot districts a program of deferred prosecution of adults has been initiated under the Executive Authority of the Attorney General. Neither of the foregoing deferred plans for prosecution require approval of the court. Involving the court in this type of prosecutorial decision would seemingly violate the doctrine of separation of powers, generally discussed in comments under section 3162(b) and section 3172. Because of the foregoing reasons, it is proposed that the language "with the approval of the court" be deleted that appears in the version S. 798 [*sic*], as passed by the Senate.

Materials from the History of the 1979 Amendments

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

18 U.S.C. § 3161(h)(3)

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

Derivation

Mikva bill, § 3161(b)(3) (p. 281): "The period of delay resulting from the absence or unavailability of the defendant."

Original Ervin bill, § 3161(c)(3) (p. 288). Minor language change.

1972 Senate subcommittee bill, § 3161(c)(3) (p. 299). Added the definitions of absence and unavailability contained in subparagraph (B). There were no references to essential witnesses and there was no reference to resisting "appearance at" trial.

1974 Senate committee bill, § 3161(h)(3) (p. 314). Added references to essential witnesses.

1974 House subcommittee bill, § 3161(h)(3) (p. 340). Added reference to resisting appearance at trial.

1974 House committee bill, § 3161(h)(3) (p. 340). No change.

Amended on House floor, 120 Cong. Rec. 41789-90, to correct a typographical error.

1974 act, § 3161(h)(3) (p. 377).

Not amended in 1979.

ABA standard 2.3(e) was similar to the Senate subcommittee version. ABA standard 2.3(d)(i) dealt with unavailability of evidence material to the state's case.

Editor's note: In all bills until the 1974 House subcommittee bill, the time limit to trial began with the filing of an information or indictment even if the defendant had not been brought within control of the court. Thus, the "absence or unavailability" exclusion had a broader reach, as originally drafted, than it does in the act as passed.

Materials Addressed to Original Ervin Bill

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 3, line 24, immediately after the period, add the following: "A defendant shall be considered absent whenever his whereabouts are unknown and, in addition (A) he is attempting to avoid apprehension or prosecution, or (B) his whereabouts cannot be determined by due diligence. A defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence."

Testimony of Senator Philip A. Hart, 1971 Senate Hearings 22

Section 3161(c)(3) of this bill exempts from the measured period of 60 days, time when the defendant is "unavailable." It is not clear whether this includes time when the accused is serving a prison sentence on a conviction for State or Federal crime. This issue of speedy trial for someone serving another sentence should also be clarified in these hearings. It may seem at first blush that a prisoner's right to speedy trial is less important. But the Supreme Court pointed out, in *Smith* v. *Hooey*, 393 U.S. 374, that there are several reasons why he too suffers from undue delay.

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35

In Section 3161(c)(3), which is based on the ABA's speedy trial standards, the definitional language of the ABA Standards should also be employed, either in the statute or the legislative history. This language is as follows:

> "A defendant should be considered absent whenever his whereabouts are unknown and in addition he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant should be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial."

If this is not done, it might appear that the omission was deliberate and a broader definition of "absence or unavailability" might be implied. The quoted language makes clear, in addition, that the prosecution must exercise due diligence in locating the defendant and attempting to bring him before the court.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 254-55

Proposed section 3161(c)(3) exempts from the 60-day limitation "any period of delay resulting from the absence or unavailability of the defendant." The terms "absence" and "unavailability" are less precise that they might be. Their meaning becomes quite obscure when they are considered together with the provision of section 3162 which states that charges should be dismissed if a defendant "through no fault of his own or his counsel" is not brought to trial within the prescribed time limitation. That provision indicates that section 3161(c)(3) could be construed to include only those periods of delay which are directly caused by willful conduct of the defendant. Thus, it is conceivable that the "absence or unavailability" of the defendant would not cover any situation in which a defendant is only technically a fugitive. A person becomes technically a fugitive whenever the warrant of arrest is issued for him even though he may be totally unaware that he is wanted by law enforcement authorities. This interpretation of the provisions of section 3161(c)(3) is buttressed by the language in section 3161(b)(1), that the 60-day limitation commences to run whenever a "summons is issued," *i.e.*, before a defendant may even have notice of the issuance of the summons. It is open to doubt, therefore, whether a delay attributable to a defendant's illness, or to his arrest in another jurisdiction on charges for which he is ultimately acquitted, would be excludable within the meaning of section 3161(c)(3). Further, if a defendant is available for 58 days prior to trial, but then becomes a fugitive for two years, under section 3161(c)(3), upon his rearrest, the Government would only have two days to bring him to trial. This is obviously impossible since the evidence could not be reassembled on such short notice. We therefore believe that the terms "absence" and "unavailability" should be defined and that specific provisions should be made for situations where the defendant becomes a fugitive.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261-62

[§ 3162(a)](3) The period of delay resulting from the absence or unavailability of the defendant, including the defendant's inability to stand trial because of his mental or physical disability. A defendant shall be considered absent whenever he is attempting to avoid apprehension or prosecution or his location is unknown and cannot be determined by due diligence. The defendant shall be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258

Section 3162(a)(3) corresponds to section 3161(c)(3) of S. 895 which excludes any period of delay resulting from the absence or unavailability of the defendant. It amends S. 895 by excluding the period of delay caused by the defendant's inability to stand trial because of his mental or physical disability. In addition, our amendment, as derived from the Second Circuit Rule, defines the terms "absent" and "unavailable."

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3162(a)](5) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258

Section 3162(a)(5) excludes a period of delay resulting from the detention of the defendant in another jurisdiction. Adapted from the Second Circuit Rules, it also requires that the prosecution have been diligent in its efforts to obtain the defendant's presence for trial. We feel that this provision is desirable since not infrequently (1) a defendant is in custody in another jurisdiction at the time he is indicted, or (2) a defendant is subsequently committed to custody in another jurisdiction after indictment, but before trial. Since time is required to prepare and serve a writ of habeas corpus *ad prosequendum* in order to secure the defendant's presence the period of delay should be excluded from the 180-day limit [proposed by the Department].

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3163](c) An indictment or information shall not be dismissed if it is not tried as required by section 3161 because of the defendant's neglect or failure to appear, in which case, he shall be deemed to be arraigned within the meaning of section 3161 on the date of his subsequent appearance before the court on a bench warrant or other process or surrender to the court.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 259

Section 3163(c) makes provision for the situation where a defendant becomes a fugitive. We have alluded to the problem posed where the defendant becomes a fugitive near the end of the time period (*e.g.*, on the 178th day), and is subsequently captured after a lengthy absence. In this case, S. 895 would require that the Government try the defendant within the days under the 180-day limit which had not expired (*e.g.*, 2 days). Obviously, it would be impossible for the Government to marshal the evidence on such short notice where only a few days remain upon re-apprehension of the defendant. Thus, the section contains a provision which allows a new time period to run in such cases.

Letter to Senator Ervin from Barbara Allen Bowman, Nov. 30, 1970, at 1971 Senate Hearings 163

3161(c)(3) which tolls the time for periods of delay resulting from the absence or unavailability of the defendant should require an on the record showing by the government of notice to the defendant and subsequent good faith efforts to locate him.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 51

ABSENCE OR UNAVAILABILITY.—Section 3161(c)(3) provides for exclusion of time during which the defendant is absent or unavailable. Therefore, a fugitive defendant with an outstanding indictment cannot deduct from his 60 days the time during which he avoids prosecution. At the suggestion of Senator Thurmond and Mr. Rezneck, the committee has amended the provision so that it follows the language of the American Bar Association Speedy Trial Standards in defining the terms "absence" and "unavailability." Furthermore, the term "unavailable" means that if the defendant is located in another jurisdiction and is not resisting extradition and the attorney for the Government has exercised due diligence, the reasonable delay related to the administrative operation of the extradition system would also be excluded.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 114

A defendant could "skip" bail on the 59th day of the time period and once apprehended, the Government would have 1 day within which to reassemble the evidence and to try him. This results in the anomalous situation of an escapee being given priority as to a trial date over those defendants who have abided by the conditions of their bail.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 115

If an essential Government witness becomes ill on the 59th day, there is nothing in the bill to prevent dismissal of the case on the 60th day. Similarly, an expert Government witness may be required to be in attendance in several courts on the same day.

Letter to Mark Gitenstein, Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Richard A. Hauser, Attorney-Advisor, Office of Criminal Justice, U.S. Department of Justice, June 12, 1973, at 1973 Senate Hearings 196

The Deputy Attorney General also pointed out in his testimony that if an essential government witness is unavailable on the 59th day, there was nothing in S. 754 to prevent dismissal of the case on the 60th day. The problem becomes more acute when expert witnesses are involved because their presence may be required in different courts on the same day. Unjustified dismissals could be avoided by adding the following language to Section 3161 (c)(1)(A): "(vii) delay resulting from the absence or unavailability of an essential witness." The same result could be achieved by adding "or an essential witness" after "defendant" in Section 3161 (c)(3)(A) and by making the necessary conforming changes in Subsection (B).

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 37

Subparagraph 3161(h)(3) provides for exclusion of time during which the defendant or an essential witness is absent or unavailable. Therefore, a fugitive defendant with an outstanding indictment cannot deduct from his 60 days the time during which he avoids prosecution. At the suggestion of Senator Thurmond and Mr. Rezneck, S. 754 was drafted so that it follows the language of the American Bar Association Speedy Trial Standards in defining the terms "absence" and "unavailability." Furthermore, the term "unavailable" means that if the defendant is located in another jurisdiction and is not resisting extradition and the attorney for the Government has exercised due diligence, the reasonable delay related to the administrative operation of the extradition system would also be excluded.

This subsection has been amended by the Committee to include the absence of an essential witness, as well as the absence of the defendant, as one of the periods of delay which are exempted from the time limits. The necessity of including essential witnesses in this exclusion was pointed out by testimony of the Justice Department before the Subcommittee on Constitutional Rights. The subsection as now constructed would remedy the situation in which an essential government witness becomes unavailable on the 59th day after indictment. Under the provisions contained in S. 754 as introduced, the case would be dismissed on the 60th day. This problem is especially acute when expert witnesses are involved because their presence is often required in different courts on the same day.

This problem is resolved by the subsection in that an "absent" or "unavailable" witness is treated in the same manner as an "absent" or "unavailable" defendant. By an "essential witness" the Committee means a witness so essential to the proceeding that continuation without the witness would either be impossible or would likely result in a miscarriage of justice. For example, a chemist who has identified narcotics in the defendant's possession would be an "essential witness" within the meaning of this subsection.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 200-01

At page 6, line 2, amend section 3161(h)(3)(B), by inserting after the word "resists" and before the word "being", the following: "appearing at or".

Comments

Defendants arrested in the district of the offense or in other districts frequently are released under the Bail Bond Reform Act to "appear" for court, thus it is necessary that these conditions of release be recognized in dealing with the defendant who resists appearing as ordered.

Testimony of James L. Treece and H. M. Ray, Members, Advisory Committee of U.S. Attorneys, 1974 House Hearings 211-213

Mr. TREECE. There are very many areas I have included in my statement that I feel the Congress would overlook to pass this bill, areas that could delay trials. For example, transportation of prisoners from other States.

Mr. CONYERS. What about it?

Mr. TREECE. There is no exception there.

Mr. CONYERS. You mean that would prevent anyone in the 50 States from being transported, there is a time problem in moving a prisoner from any one of the States to another?

Mr. TREECE. At the present time, the marshal, in order to save money, will take one trip to transport several prisoners and they will save these trips up so it is not necessary to take a separate trip with each prisoner. That is just one example.

Mr. CONYERS. You mean that we should, in trying to effect the bill, worry about how many trips the U.S. marshal is going to take? That is the counterbalance?

Mr. TREECE. I don't know whether the marshal's office has been consulted to see what the expense would be to transport each prisoner separately.

Mr. CONYERS. I don't either, but if you are raising just a hypothetical question, I would be happy to check it out.

Mr. TREECE. Not hypothetical, it is an actual fact.

. . . .

Mr. CONYERS. I will yield to the gentleman from Maine.

Mr. COHEN. I thank the chairman for yielding.

I refer you to pages 4, 5, and 6 of the Senate bill. It seems to me it takes into account any delays resulting from the absence of defendant or central witness. For example, on page 5, line 16, section 3(A), "Any period of delay resulting from the absence or unavailability of the defendant or an essential witness." Starting with line 19, and carrying over to the next page, it seems to take into account the very objection you are raising.

Mr. TREECE. It says "whereabouts unknown"; isn't that right?

Mr. COHEN. Section 3(A) doesn't refer to whereabouts known, line 16. But page 6, "* * * whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists being returned for trial."*

. . . .

Mr. TREECE. I think I can answer it now. As far as unavailability of persons whose presence cannot be obtained through due diligence, we don't know whether the presence they are talking about is presence within the system, because he might be within the system and still not available for trial. So I don't know whether they are saying this is an exception or not because the law is not clear as written.

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*Ellipsis in original.

Mr. CONYERS. What kind of example would that be where he is present in the system?

Mr. TREECE. It might be we can't find him in Colorado.

Mr. CONYERS. He is lost in the prison system somewhere?

Mr. TREECE. No, he is in the system awaiting preliminary hearing or removal hearing, in Florida, let's say.

Mr. RAY. Let me give an example that just occurred a few weeks ago. We had a person charged with a bank robbery. He was convicted in Cleveland, Ohio, received sentence, and he is an habitual criminal. He had escaped from Mr. Treece's Colorado State Prison where he was serving a sentence——

Mr. COHEN. Let me interject just once again to respond to your statement. Page 5 specifically refers to——I hate to use the word "specificity"——

Mr. CONYERS. As long as you pronounce it correctly. Your colleagues use it.

Mr. COHEN [continuing].* "Delay resulting from trials with respect to other charges against the defendant."

Mr. TREECE. This is the same charge. He is arrested in another jurisdiction on a charge. His presence is obtainable, as they say here, by diligence. We could send a marshal and get him today. The marshal does not want to go to that expense because he might have another prisoner tomorrow or the next day or the next day.

Mr. COHEN. Page 4, line 18, "Any period of delay resulting from other proceedings concerning the defendant, including but not limited to." Isn't that not taken into account?

Mr. TREECE. This is the proceeding. He is not involved in another, he is involved in ours.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41789-90

The floor amendment to this paragraph was one of a series of amendments described as "technical, conforming, and perfecting" amendments which were offered by Representative Cohen and considered and adopted en bloc. There was no explanation or discussion of the amendment to this section.

Materials from the History of the 1979 Amendments

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

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*Brackets in original.

18 U.S.C. § 3161(h)(4)

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

Derivation

Mikva bill, § 3161(b)(1) (p. 281). The period during which a defendant is incompetent to stand trial was included among the examples of "other proceedings concerning the defendant."

Original Ervin bill, § 3161(c)(1) (p. 288). Minor language change.

1972 Senate subcommittee bill, § 3161(c)(4) (p. 299). Made delay resulting from incompetency a separate paragraph, with only a minor change in language.

1974 Senate committee bill, § 3161(h)(4) (p. 315). No change.

1974 House subcommittee bill, § 3161(h)(4) (p. 341). Added the reference to physical inability to stand trial.

1974 House committee bill, § 3161(h)(4) (p. 341). No change.

No House floor amendments.

1974 act, § 3161(h)(4) (p. 377).

ABA standard 2.3(a) was similar to the provision of the Mikva bill.

Materials Addressed to Original Ervin Bill

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261-262

[§ 3162(a)](3) The period of delay resulting from the absence or unavailability of the defendant, including the defendant's inability to stand trial because of his mental or physical disability.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258

Section 3162(a)(3) corresponds to section 3161(c)(3) of S. 895 which excludes any period of delay resulting from the absence or unavailability of the defendant. It amends S. 895 by excluding the period of delay caused by the defendant's inability to stand trial because of his mental or physical disability.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 51

The commentary on this provision in the draft report was virtually identical to the commentary at pages 37-38 of the 1974 Senate committee report, set forth below, except that the 1972 draft referred to the "court days" limitation that the 1972 Senate subcommittee bill applied to the exclusion for "other proceedings."

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 37-38

Subparagraph 3161(h)(4) of the bill as reported deals with the exclusion of periods of time during which the defendant is mentally incompetent to stand trial. Reference is made to the exclusion of periods of time relating to examination for mental incompetency in subparagraph 3161(h)(1)(A) as a "proceeding concerning the defendant". That provision provides for the exclusion of time consumed in competency hearings and a reasonable number of hospital days actually consumed by physicians in mental examination. However, once the defendant is determined incompetent the only consideration is his return to competency. The length of time required for him to do so obviously should not be the basis of a speedy trial claim under the bill. Therefore, a separate exclusion has been added to subsection 3161(h).

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 201

At page 6, line 5, amend section 3161(h)(4), by striking the word "incompetent" and inserting in lieu thereof the words "mentally or physically unable".

Comments

The above language recognizes that a defendant may be physically as well as mentally unable to stand trial.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 33

Section 3161(h)(4) provides for the exclusion from the time limits between arrest and trial of the period during which a defendant is incompetent to stand trial. The Subcommittee added language to clarify the intent of the section. Both mental and physical reasons would qualify as grounds for an exclusion under this provision.

Materials from the History of the 1979 Amendments

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

18 U.S.C. § 3161(h)(5)

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

Derivation

Mikva bill, § 3161(b)(1) (p. 281). The period of treatment pursuant to 28 U.S.C. § 2902 was included among the examples of "other proceedings concerning the defendant."

Original Ervin bill, § 3161(c)(1) (p. 288). Minor language change.

1972 Senate subcommittee bill, § 3161(c)(5) (p. 299). Made delay resulting from treatment under 28 U.S.C. § 2902 a separate paragraph, with only a minor change in language.

1974 Senate committee bill, § 3161(h)(5) (p. 315). No change.

1974 House subcommittee and committee bills, § 3161(h)(5) (p. 341). No change.

No House floor amendments.

1974 act, § 3161(h)(5) (p. 377).

Not amended in 1979.

The ABA standards included no provision about deferral of prosecution for narcotics treatment.

Editor's note: Section 3161(h)(1)(C), an apparently redundant provision, was added by the 1979 amendments.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 51

The commentary on this provision in the draft report was virtually identical to the commentary at page 38 of the 1974 Senate committee report, set forth below, except that the 1972 draft referred to the "court days" limitation that the 1972 Senate subcommittee bill applied to the exclusion for "other proceedings."

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 38

Subparagraph 3161(h)(5) of S. 754 deals with the exclusion of periods of time during which the defendant is under examination or treatment* pending trial pursuant to the Narcotic Addict Rehabilitation Act of 1966 (NARA). Reference is made to the exclusion of periods of time relating to examination for addiction pursuant to NARA in subparagraph 3161(h)(1)(A) as a "proceeding concerning the defendant." That provision provides for the exclusion of time actually consumed in hearings on the issue of addiction and a reasonable number of hospital days actually consumed by physicians in physical examination. However, once the defendant is determined to be an addict and falls within the eligibility provision of NARA, he is covered by that act and speedy trial is much less relevant. Therefore a separate exclusion has been added to subsection 3161(h).

Materials from the History of the 1979 Amendments

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

18 U.S.C. § 3161(h)(6)

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

Derivation

Mikva bill, § 3161(b)(4) (p. 281). This provision was similar in substance to the final version, but allowed the exclusion only if the subsequent charge was filed "within a reasonable period."

Original Ervin bill, § 3161(c)(4) (p. 289). Eliminated the reference to a "reasonable period."

1972 Senate subcommittee bill, § 3161(c)(6) (p. 299). Minor language changes.

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*So in original. The provision dealt only with treatment.

1974 Senate committee bill, § 3161(h)(6) (p. 315). Minor punctuation change.

1974 House subcommittee and committee bills, § 3161(h)(6) (p. 341). No change.

No House floor amendments.

1974 act, § 3161(h)(6) (p. 377).

Not amended in 1979.

ABA standard 2.3(f) was similar to the final version.

Editor's note: The reference to "the date the time limitation would commence to run as to the subsequent charge" appeared in the Mikva bill. Hence, it was originally drafted in the context of a unitary time limit to commencement of trial from arrest or issuance of a summons or, if earlier, the filing of an information or indictment.

Materials Addressed to Original Ervin Bill

"Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 71

Section 3161(c)(4), lines 4 and 5, are also subject to abuse because in many cases the government would not find out the offenses which are required to be joined with the offense the defendant was initially arrested for until after the 60 days had expired.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 52

The commentary on this provision in the draft report was virtually identical to the commentary at page 38 of the 1974 Senate committee report, set forth below. However, the example in the last sentence referred to a decision "50 days after arrest."

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

. . . .

(6) Delays between the dropping of a charge and the filing of a new charge for the same or related offense;

1974 Senate Committee Report 38

Subparagraph 3161(h)(6) provides for the case where the Government decides for one reason or another to dismiss charges on its own motion and to then recommence prosecution. Under this provision only the period of time during which the prosecution has actually been halted is excluded from the 60-day time limits. Therefore, under 3161(h)(6) when the Government dismisses charges only the time between when the Government dismisses charges to when it reindicts is excluded from the 60-day time limits. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant then waits six months and reindicts the defendant for the same offense the Government only has 10 days in which to be ready for trial.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 201

At page 6, lines 9 through 15, amend section 3161(h)(6) by deleting the language set forth in subsection (6) in its entirety and inserting in lieu thereof the following:

> "(6) Any period of delay resulting from the attorney for the government filing a dismissal of a criminal charge before trial and thereafter filing a new complaint, indictment, or information, based upon the same conduct or criminal episode; provided that upon good cause being shown, the trial period provided for in section (c) may be extended thirty additional days by the Court upon the institution of a new charge."

Comments

The above language is proposed in recognition of the fact that the Court could hardly schedule a new case, following dismissal of an old case, for trial in any less period than thirty days. For example, it is intended by the above language that if a criminal charge is dismissed after fifty days have expired and thereafter a new charge is filed that the Court would have the ten days not used earlier on the initial charge, plus an additional thirty days to schedule trial on the new charge.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 202-03

At page 25, between lines 9 and 10, amend Title I, by adding after section 3171, new sections 3172 and 3173 to read as follows:

> "§ 3172. *Dismissal by attorney for government*
>
> "The attorney for the government may *nolle prosequi* or dismiss an indictment, information, or complaint at any time prior to trial and the prosecution shall thereupon terminate. The entry of such dismissal or *nolle prosequi* shall not bar a subsequent prosecution. A dismissal shall not be filed during trial without consent of the defendant and leave of the court."

Comments

The Constitution provides that the Executive "shall take care that the laws be faithfully executed." Article II, Sec. 3. As part of this duty, the Executive branch has the sole responsibility for determining what charges should be brought against a defendant. *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir.

1967); *People* v. *Henzey*, 24 App. Div. 2d 764, 263 N.Y.S. 2d 678 (1965). "[A]s an incident of the Constitutional separation of powers, . . . the Courts are not to interfere with the free exercise of the attorneys of the United States in their control over criminal prosecutions."[*] *United States* v. *Cox*, 342 F.2d 167, 171 (C.A. 5, 1965), cert. denied, 381 U.S. 935 (1966), quoted with approval in *Newman* v. *United States*, 382 F.2d 479, 481 (C.A. D.C., 1967) (Burger, J.). Complete executive discretion has heretofore been specifically acknowledged by the courts, with respect to decisions to accept a plea to a lesser offense from one codefendant but not another, or to prosecute a defendant on a lesser or more serious charge. See *In Re Petition of United States For Writ of Mandamus*, 306 F.2d 737 (C.A. 9, 1962); *Newman* v. *United States, supra; Hutcherson* v. *United States*, 345 F.2d 964 (C.A. D.C., 1965); *United States* v. *Ammidown*, —— F.2d —— (C.A. D.C. No. 72-1964, Nov. 16, 1973).

In *Newman* v. *United States*, 382 F.2d 479 (C.A. D.C., 1967) (Burger, J.), the court stated in determining whether to reduce a charge, the prosecutor is acting not as an officer of the court, but as an attorney for the executive. As such "the courts have no power over the exercise of his duty within the framework of his professional employment." *Newman, supra*, at 481. *See also United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), *cert denied*, 381 U.S. 935; *Smith* v. *United States*, 375 F.2d 243 (5th Cir. 1967); *Pugach* v. *Klein*, 193 F.Supp. 630 (S.D. N.Y. 1961); *United States* v. *Shaw*, 226 A.2d 366 (D.C. App. 1967).

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 203

The department proposed the following new section to be added to title I of the bill:

SEC. 103. That part of Rule 48(a), Federal Rules of Criminal Procedure of Title 18, United States Code, being in conflict with the foregoing section 3172, is hereby rescinded and repealed.

Comments

See comment under 3172.

Materials from the History of the 1979 Amendments

1979 Senate Committee Report 9-10

In computing the time within which an information or indictment must be filed or the time within which a trial must commence, the Act excludes from either computation specific and recurring periods of time often found in criminal cases. These include periods consumed by:

> . . . .
>
> (6) dismissal by the Government of an indictment or information and subsequent entry of the same charge, or a charge required by the constitutional doctrine of double jeopardy to be joined with it, against the same defendant (just as the defendant should not profit from delay he can create for his own tactical advantage, neither should the Government); . . . .

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[*] Ellipsis in original.

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

18 U.S.C. § 3161(h)(7)

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

Derivation

Mikva bill, § 3161(b)(5) (p. 281). This provision permitted the exclusion only if good cause for not granting a severance existed; it directed that severance be granted in other cases so that each defendant could be tried within the time limits applicable to him.

Original Ervin bill, § 3161(c)(5) (p. 289). Minor language change.

1972 Senate subcommittee bill, § 3161(c)(7) (p. 300). Eliminated the preference for severance; incorporated the final language.

1974 Senate committee bill, § 3161(h)(7) (p. 315). No change.

1974 House subcommittee and committee bills, § 3161(h)(7) (p. 341). No change.

No House floor amendments.

1974 act, § 3161(h)(7) (p. 377).

Not amended in 1979.

ABA standard 2.3(g) was similar to the provision in the Mikva bill.

Materials Addressed to Original Ervin Bill

"Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 71-72

Section 3161(c)(5), lines 13 and 14, will lead to abuses and increased trial time if the government is required to try one defendant before other defendants are located. The period of delay should allow time for the government to find codefendants.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 255

Proposed section 3161(c)(5) exempts from the 60-day limitation a "reasonable period of delay" when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run, and there is good cause for not granting a severance. In all other cases a severance must be granted. We assume, for the purposes of discussion, that the provision intends to put the burden of proof upon the Government to make a showing of good cause for not granting a severance. This is, of course, contrary to prevailing law which requires the moving party to show that he is entitled to a severance. The basic reason for simultaneous trial of co-defendants is the saving of Government time (and money), of court time, and of the time required for witnesses to be in attendance, which a joint trial provides. The proposed provision, therefore, would be destructive of the basic purpose of the statute to eliminate delay in the courts. As a practical consequence of this provision, it would be virtually impossible to try co-defendants together. Consequently, there would be an appreciable increase in the number of trials before the courts. Ultimately, this would lead to additional delays.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3162(a)](4) The period of delay when the defendant is joined for trial with a co-defendant as to whom the time for trial has not run. The granting of a continuance as to one defendant shall be an exclusion from the time limits of section 3161 as to all defendants in that case. Actual prejudice to a defendant resulting from this period of delay must be demonstrated by such defendant if a severance is to be granted to him.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258

Section 3162(a)(4) amends section 3162(c)(5)* of S. 895 by substituting a modified version of the Second Circuit Rule. While everyone recognizes the utility of multi-defendant trials to effectuate the prompt and efficient dispensation of criminal justice, it is inevitable that the procedural and technical problems engendered by the application of a speedy trial statute will become intensified in multi-defendant, multi-count cases. We feel that the efficiency and economy of joint trials far outweighs the desirability of granting a severance where the criterion is simply the passage of time. Such an approach would only compound the problem since severances create more trials which in turn cause more delay. Presently, in order for the court to grant a severance, the defendant must make a showing of prejudice. See Rule 14, F.R. Cr. P. As mentioned above, we think that this same requirement should apply to motions predicated upon speedy trial concepts.

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*So in original. Reference should be to section 3161(c)(5).

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 52

The commentary on this provision in the draft report was virtually identical to the commentary at page 38 of the 1974 Senate committee report, set forth below.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 115

In multiple defendant cases, such as major narcotic conspiracies, judges may be forced to grant severances which would otherwise not be required. This in turn will lead to more trials and more congestion.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

. . . .

> (7) Reasonable periods of delay when the defendant is joined for trial with a codefendant, and neither defendant has shown good cause to grant a severance;

1974 Senate Committee Report 38

Subparagraph 3161(h)(7) provides for the exclusion of time from the time limits where the defendant is joined for trial with a codefendant who was arrested or indicted after the defendant. The purpose of the provision is to make sure that S. 754 does not alter the present rules on severance of codefendants by forcing the Government to prosecute the first defendant separately or to be subject to a speedy trial dismissal motion under section 3162.

The committee amended this provision, which appeared as 3161(c)(5) in the bill as introduced,* to make it absolutely clear that Congress did not intend to alter the traditional rules of severance. According to the Justice Department, the original provision would have required the Government to show good cause for not granting a severance. This is contrary to present law which places the burden on the defendant who seeks the severance. The new provision deletes any reference to burdens of proof or "good cause" and simply refers to codefendants as to whom "no motion for severance has been granted."

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*The reference is to the original Ervin bill. The amendment was incorporated in the 1972 Senate subcommittee bill.

Materials from the History of the 1979 Amendments

1979 Senate Committee Report 24-25

One concern is disposed of quickly. The observation has been made that the rigidity of the time limit will force the courts to disregard the principle of "judicial efficiency." Defendants who are properly charged with the joint commission of an offense should ordinarily be tried together to save the time, expense and inconvenience of separate prosecutions. It has been reported that some trial judges have granted severances unnecessarily in multidefendant cases "so that a defendant whose case is moving slowly does not hold up the trial of his codefendants." In its own study the Department studied 180 multidefendant cases. It found no reflection of the occurrence of such incidents. Nor is there an indication of any such occurrences in the data compiled by the Administrative Office. If the Act has been interpreted to require such a result, the Committee calls to the Senate's attention § 3161(h)(7), which provides specifically for exclusion of "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom time for trial has not run."

Editor's Note

Although this paragraph was not amended in 1979, expressions of Congressional views about general principles of interpretation may be considered relevant. These are collected under 18 U.S.C. § 3161(h)(1).

18 U.S.C. § 3161(h)(8)

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

Derivation

Mikva bill, §§ 3161(b)(6), (7) (p. 282). These provisions excluded periods of delay resulting from continuances for good cause on motion of the defendant and one continuance, not to exceed 60 days in duration, at the request of the government upon a showing of good cause and special circumstances peculiar to the case. See also § 3163(b) (p. 283), which made the time limits inapplicable to antitrust, securities, and tax prosecutions.

Original Ervin bill, §§ 3161(c)(6), (7), (8) (pp. 289, 290). Paragraphs (6) and (7) excluded any periods of delay resulting from a continuance granted at the request of either party upon a showing of good cause, but only if the request was made more than fifteen days prior to the date set for trial; the excludable delay was limited to seven days. Paragraph (8) provided for the exclusion of additional delay resulting from a continuance granted at the request of either party upon a finding by the judge that the ends of justice could not be met unless the continuance was granted. The court was required to set forth in writing its reason for granting the continuance, after considering the right of the defendant to a speedy trial and the public interest in a prompt disposition of the case. See also § 3163(b) (p. 292), regarding antitrust, securities, and tax prosecutions.

1972 Senate subcommittee bill, § 3161(c)(8) (p. 300). Eliminated the separate "good cause" continuances; changed the "ends of justice" continuance to include continuances granted sua sponte, to require the finding to be "that the ends of justice and the best interest of the public as well as the defendant would be served thereby," and to permit the reasons to be set forth either orally or in writing. Except for the description of the required finding, the provision was identical to the final version of subparagraph (A) of section 3161(h)(8).

1974 Senate committee bill, §§ 3161(h)(8), 3162(b) (pp. 315, 318). Section 3161(h)(8) required the finding to be that the ends of justice "outweigh the best interest of the public and the defendant in a speedy trial." Subparagraph (B) was added, setting forth factors to be considered: the introductory language and clause (i) were in their final form; clause (ii) referred to "whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the" time limits; clause (iii) referred to unusually complex fact determinations by the grand jury or events beyond the control of the court or the government. Section 3162(b), which dealt with the dismissal sanction and permitted reprosecution in exceptional circumstances, provided that these did not include "general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses."

1974 House subcommittee bill, § 3161(h)(8) (p. 342). Made minor language and punctuation changes in subparagraphs (A) and (B). Added subparagraph (C), providing that continuances not be granted under the subsection "because of general congestion of the court's calendar, lack of diligent preparation, or failure to obtain available witnesses."

1974 House committee bill, § 3161(h)(8) (p. 342). Revised subparagraph (C) to make the prohibition apply to "general congestion of the court's calendar or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government."

Amended on House floor, 120 Cong. Rec. 41788-89, to insert the comma after "calendar" in subparagraph (C).

1974 act, § 3161(h)(8) (p. 377).

Subparagraph (B) was amended in 1979. The House accepted the Senate provision without change. Clauses (ii) and (iii) of the subparagraph were reenacted, with amendments, and clause (iv) was added.

ABA standard 2.3(c) provided for an exclusion for the period of delay resulting from a continuance granted at the request of or with the consent of the defendant; however, standard 1.3 stated that the court should grant a continuance only on a showing of good cause. ABA standard 2.3(d) provided for the exclusion of periods of delay resulting from continuances granted at the request of the prosecution if granted because of the unavailability of evidence material to the state's case, when the prosecutor has exercised due diligence and there is reason to believe the evidence will become available, or if the continuance is granted to allow additional preparation time which is justified because of the exceptional circumstances of the case. Standard 2.3(h) provided for the exclusion of "other periods of delay for good cause." Standard 2.3(b) provided for the exclusion of "[t]he period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances."

Editor's note: Material bearing on continuances because of docket congestion should be considered in the light of the development of 18 U.S.C. § 3174.

Materials Addressed to Mikva Bill

Prepared Statement of Representative Abner J. Mikva, 1971 Senate Hearings 128

Any such fixed time for trial raises the question of how the time period shall be calculated. When does it begin? What days are counted and what days excluded? Section 3161 provides for a number of obvious exceptions, but there are undoubtedly others which are necessitated by variations in locale and practice. What seems fair and sensible in terms of the Northern District of Illinois with 13 judges sitting continuously may not be reasonable in Wyoming with its lone District Court judge. A way must be found to allow for unanticipated bona fide exceptions to the time limit, without creating so large a loophole as to deprive the time limit of its meaning and intent. For example, California imposes a time limit of 120 days, but the requirement may be waived by the defendant. This opens the door to considerable pressure on the defendant to waive the time limit, depriving the speedy trial requirement of its stringency.

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 172

The exclusionary periods under section 3161(b) are limited and not all-inclusive. When the Advisory Committee [on Federal Criminal Rules] attempted to enumerate the exclusions, we finally came to the conclusion that the "good cause" avoidance of specific time limitations was the best that we could do.

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 172

Under section 3162(b) it is provided that a dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined. The Department of Justice has adequately demonstrated to the Advisory Committee [on Federal Criminal Rules] that such a proviso is too drastic and in exceptional cases, may result in a miscarriage of justice. In the run-of-mile[*] case there would not be too great a problem, but the "exceptional" case will be the one which will meet the public eye. It may be that the Department of Justice could furnish a list of these "exceptional" cases which could be added to the antitrust, securities, or tax law trials which are excluded under section 3163(b).

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[*] So in original.

Materials Addressed to Original Ervin Bill

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 35-36

In Sections 3161(c)(6) and (7), we believe that it is desirable to eliminate the words "but in no event shall any such period of delay be excludable for any period in excess of seven days." These provisions are unclear, but they appear to have the effect of limiting continuances granted to either the defense or the prosecution to 7 days for purposes of extending the 60 day limitation period. We believe such a limitation of continuances is undesirable and inconsistent with the showing of good cause which might be made in certain cases.

Unavailability of a key witness to either side for a specified period beyond the 7 days would be good cause for a continuance; yet to limit the extension of the 60 day period in this fashion would defeat the purpose of the continuance. The statute or the legislative history should make clear that open-ended continuances will not extend the 60 day period and that a substantial showing of good cause is required for any continuance by either side. But judicial control of continuances through the good cause requirement seems to us a better method of preventing abuses than the strict 7 day provision presently provided for.

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 36

We suggest deletion of the last clause of Section 3163(b), which exempts from the speedy trial requirements cases under the anti-trust, securities, and tax laws of the United States. We think that the principle of exemptions for certain types of cases is wrong. These cases proposed for exemption are actually among the worst contributors to delay in the Federal courts and frequently drag on for years, impeding the trial of other cases. There is no reason why these anti-trust, securities, and tax cases cannot be tried promptly. In almost all such cases, the bringing of a criminal charge follows a long government investigation, involving extensive grand jury proceedings. The defendant also is well aware of the possibility of prosecution and has substantial time to prepare his case even before the formal institution of prosecution. No doubt more time for trial preparation may be required for some of these cases because of their complexity, but the continuance provisions of the Act can make allowance for such cases on an appropriate showing of good cause. A case-by-case approach to such problems is preferable to a blanket exemption for any class of cases.

Testimony of Senator Charles H. Percy, 1971 Senate Hearings 68-69

Section 3161(c)(6) allows a delay of the trial only if it is requested 15 days prior to the trial. This provision strikes me as being somewhat unrealistic and arbitrary. Often, necessary delays will become obvious a week or even a few days before the trial. Certainly neither party should be forced to go to trial if not fully able and prepared. I would recommend that this section be amended so that for any good cause shown, and in the sound discretion of the court, a continuance may be granted at anytime prior to the trial.

"Supplement" to Testimony of Senator Charles H. Percy, 1971 Senate Hearings 72

Section 3163(b), line 23 [making the time limits inapplicable to antitrust, securities, and tax prosecutions], is too restrictive and should include complicated conspiracy cases, mail fraud cases, organized crime and narcotics cases.

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 82-83

Also, I am somewhat concerned with the provision on page 5 of the bill, line 11, which requires the judge to set forth, in writing, in the record of the case his reasons for granting a continuance. And I submit that the rule which has been generally followed in connection with findings and conclusions of State court judges would be applicable and perhaps be better than this language. In other words, the Federal courts accept, as a finding in writing, a transcript of a proceeding wherein a judge, from the bench, has expressed his reasons, his findings, and made a record of them that is later typed up. So, I would think that if he makes his findings in the record and they are available in writing as a transcript of the proceedings, it should be sufficient. We may have electronic recording of testimony someday, and we do have it, or will have, with the magistrates now. So, I think we have to recognize that, and to force the judge with maybe 20 or 30 people or more before him in one morning to remember which ones he has granted a continuance to and for what reason is unduly taxing to the judge.

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 86

Senator ERVIN. And should there be some kind of escape even from that [a time limit longer than 60 days], say, where the case is continued beyond that period for the benefit of the defendant, or where the court finds that the continuance in a case is in the interest of justice?

Judge STEPHENS. Yes. I think there are cases where the defendant is up against a very difficult time in which to put together his defense. He faces a rather formidable opponent with unlimited means at the opponent's disposal against him, and he may need much more time than that, so that if he asked for it he should get it. But I agree with the concept that it should be subject to an order of the court and that no automatic extension can be granted, or should be; and that there should be a big effort to prevent the case from getting stale, because the public interest is lost if the case gets very old.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 113

Without attempting to be exhaustive, one of the principal problems that the United States Attorneys would face if the bill were enacted in its present form is an overwhelming number of demands for trial on the part of defendants for purely tactical reasons. Our present system of criminal justice presently depends on a substantial number of guilty pleas from defendants in order to keep abreast of the caseload of the courts. This is not an indictment of the system at all, for it has been generally recognized that guilty pleas, frequently entered as the result of agreement with the prosecution to reduce the offense charged, have an entirely legitimate place in the administration of the criminal law. Though the percentage of guilty pleas has dropped in recent years, the vast majority of all convictions—indeed, 85 percent of the convictions in the federal system—still result from plea rather than trial. [Footnote omitted.] The sudden imposition of a time limit which is both inflexible and extremely short may well lead to a substantial reduction in the number of guilty pleas, not because the defendant does not have every reason for pleading guilty, but because he may recognize that by demanding a trial, he may well be the beneficiary of the mandatory dismissal provided for under S. 895. If enough defendants took the opportunity to demand trial, even though under other circumstances they would have pleaded guilty, the dramatic increase in demand for judicial manpower would itself prevent the prosecution and the judiciary, acting in the best of faith and with the greatest of diligence, from complying with the mandatory time limit.

The specter of such a mass dismissal with prejudice of criminal charges is one which I am confident this Subcommittee, no less than the Department, would abhor. I would be less than honest, though, if I said that I felt that this possibility is one which should entirely prevent the imposition of any mandatory time limit followed by dismissal with prejudice. I think that such a probability or even a possibility, however, does counsel that adequate exceptions be made to the prescribed period of time to cover cases of manifest injustice—along the lines suggested by Chief Judge Albert Lee Stephens of the Central District of California when he testified before this Committee; that the time limit ultimately determined upon be not unduly short; and that it be imposed in stages in order that the system may have a reasonable period of time to adjust to it on a graduated basis. I believe that Senator Percy's testimony before the Subcommittee suggested some sort of a staged imposition of the time limit, and the Department heartily concurs in this general approach.

Testimony of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 120

[Mr. **Baskir.**] But a bill that approached the problem reasonably, slowly, with plenty of opportunity to prepare for the time limits, I suspect, would reduce the mandatory dismissal to a few isolated cases where it was proper.

Mr. **Rehnquist.** Well, it would reduce it to individual cases where it was proper, but the basic problem would remain although it would remain in more isolated cases, and that is that the prosecutor even though he moves with good faith and reasonable diligence may not be able by himself to comply with the provisions of the law.

The Second Circuit Rule, for instance, I think was finally promulgated with an exemption for the case where there was not available judicial manpower to try the case. The draft bill here does not have such an exclusion. So that you would have a dismissal not because the prosecutor is sitting on his duff but because although he has tried other elements in the judicial process have not performed properly.

Mr. **Baskir.** Of course in that particular case the penalty, which would be felt very severely by the prosecution, would also be felt by the court. The court's purpose is to see that justice is done, and if justice is not done, because of this arbitrary dismissal resulting from a breakdown of the judicial system, the sanction would be really operating on the court, and also of course on society which presumably has the same interest as the court in seeing that justice is done.

Testimony of Representative Abner J. Mikva, 1971 Senate Hearings 124

The question of how the time period should be calculated is obviously a serious one. My proposal provides for a number of obvious exceptions. It does not provide for one, Mr. Chairman, which is in the Senate bill and which concerns me very much. It is an exception and that is one which practically allows the Court to waive the 60 days simply by filing a report. I am afraid that given the other problems the courts have, the courts would lean very heavily on that loophole and we would find that trials were not being sped up the way we hoped.

I would prefer to rely on the provision that is common to both bills which says that if the court can't meet the 60-day schedule, it ought to notify the Congress and put the monkey on our back where it belongs.

If we aren't giving them enough judicial help, if there isn't enough court room space, or enough prosecutors or defense counsel available, that problem is rightfully Congress's and we ought to deal with it. And if they can't accomplish speedy trials because of those shortages, then I think we ought to be responsible. Other than that, I am unable to see the need for any kind of blanket loophole to be given to the courts to avoid the 60 day limitation.

Under my proposal, I do allow the prosecution one additional 60-day delay for good cause shown. Obviously, there is no absolutely certain date that we know is the right one. We are all groping for something that will speed up the present inordinate delays.

"Additional Amendments to S. 895," Appendix A to Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 148

On page 4, subsections (6) and (7):

The language following "good cause" in each of these subsections needs clarification. First, it is inconsistent with subsection (8) on page 5, which seems designed to override the "but in no event" language in (6) and (7). Second, how can an arbitrary restriction to 7 days be sustained in situations where the continuance is based, for example, on serious illness of a defendant or a witness?

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 3, after line 22, insert the following:

> "(3) Any period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.".

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34141 (Sept. 30, 1971)

This new exclusion does not attempt to excuse delays arising out of chronic congestion, but is designed to accommodate delays caused by certain unique, nonrecurring events such as riots or other mass public disorders.

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 4, line 16, immediately after "of", insert a comma and the following: "or with the consent of,".

On page 4, line 20, immediately after the period, add the following: "A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and of the effect of his consent.".

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 255

Proposed section 3161(c)(6) exempts from the 60-day limitation up to seven days of any continuance granted at the request of the defense which is made more than 15 days prior to the date set for trial. The provision would permit a defendant to obtain a 30-day continuance but 23 days of that continuance would not be excludable from the 60-day limitation. This would permit a defendant to request a continuance which would carry him beyond the 60-day limitation and thereafter move for dismissal of the case against him. Of course, this would be an unjust result.

The wording of section 3161(c)(7) is equally in need of revision. This provision allows the Governor [*sic*] to request a continuance for good cause on terms similar to those under which a request can be made by the defense. It would seem that the proviso contained in this section and the immediately preceding section that only seven days of any continuance granted are excludable from the 60-day limitation contradicts the required showing of good cause. If there is good cause for the continuance, then it is not reasonable to grant only a seven-day exclusion. We suggest that if there is good cause for a continuance, then the entire period of delay should be excludable.

Proposed section 3161(c)(8) exempts entirely from the 60-day limitation any continuance granted at the request of either side upon a finding by the court in writing that the ends of justice cannot be met unless the continuance is granted. The exact relationship of this provision to section 3161(c)(6) and (7) is not clear. It may be implied that the test of "the ends of justice cannot be met" is different from the test of "showing of good cause." What the difference is, if any, has not been set forth with certainty. Nor is it certain whether either side may make a motion for a continuance under this paragraph before making a motion for continuance under paragraphs (6) and (7). Hence, we question the utility and necessity for this provision.

Certain criticisms can be advanced generally with regard to all of the exempting provisions contained in section 3161(c). No provision is made by the statute for the court to grant a continuance *sua sponte*. By failing to make a provision for the court *sua sponte* to grant a continuance, the statute infringes upon the inherent powers of the court to control its own calendar. Nor is any provision made for the Government to appeal an erroneous ruling of the court dismissing a case with prejudice.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 256

It is also noted under Section 3163(b), the time limitations do not apply to offenses filed under the antitrust, securities, or tax laws of the United States. This could conceivably raise equal protection problems resulting in constitutional attack. In addition, if specification is desirable, the exemption would not be inclusive enough. Organized crime cases, for instance take as much time in preparation and investigation as antitrust, securities or tax cases. Hence, we suggest that rather than attempting to specify the particular statute to which an exemption is to be applied, there be a general provision exempting cases of extraordinary complexity, regardless of the statute under which they arise.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261-63

[§ 3161](e) If the trial of the defendant has not commenced within 150 days from the date of his arraignment, subject to the provisions of section 3162, the court shall enter such orders as will insure that defendant will be brought to trial within the period of 180 days after his arraignment, subject to the provisions of section 3162. The court may not grant a continuance on motion of the defendant or of the prosecution after 150 days from the date of the arraignment subject to the provisions of section 3162, unless necessitated by the actual physical inability of the defendant, or his counsel, or the prosecutor, or any material witness of either the prosecution or the defendant to appear at trial because of illness or medical disability, or by exceptional circumstances under subsection (a)(10) of section 3162.

. . . .

[§ 3162](a) The following periods of delay shall be excluded in computing the time within which the trial of any offense must commence:

. . . .

(2) Any period of delay resulting from a continuance granted at the request of a defendant or his counsel, the prosecutor, or the court on its own motion upon a finding by the judge of good cause.

. . . .

(6) The period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel.

(7) The period of delay resulting from a continuance granted on stipulation of the parties. Such continuances may be granted for periods not to exceed 60 days.

. . . .

(10) Any period of delay caused by exceptional circumstances such as but not limited to the death or other incapacity of the judge assigned to the case, intimidation of witnesses, acts of God and national emergency.

(b) On the 180th day of the time period provided for in subsection (c) of section 3161, the court may extend the time limitations of section 3161 on motion of the defendant, or his counsel, or of the prosecution, subject to subsection (a)(2) of this section.

. . . .

[§ 3163](h) This chapter shall not apply to any cases where the Attorney General of the United States certifies to the court within 30 days after arraignment that the case is one of extraordinary complexity.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 257-60

Section 3161(e) adds a provision to S. 895 that we think is very desirable. This section initially instructs the court to take appropriate action to insure that trial commences within 180 days if in fact the trial does not commence within 150 days, because of factors such as court congestion. Such action might be the setting of the trial as the next case on the docket, or assigning the case to another judge for immediate trial. Additionally, this section contains a provision that would preclude the granting of a continuance on motion of the defendant or of the prosecution after 150 days from the arraignment. The exception to this clause would be cases where there was the actual physical inability of either a material witness, the defendant or his counsel, or the prosecutor to attend the trial because of illness or disability, or where there were exceptional circumstances, as described in our new section 3162(a)(10) *infra,* such as a national emergency. In both instances, the provision speaks of 150 days from the arraignment date "subject to" the various periods of delay which can be excluded under the bill, which will be described below. This provision, of course, does not preclude the court from granting a continuance on its own motion in order to arrange its calendar so that the trial may be commenced within 180 days.

. . . .

Section 3162(a)(2) deals with the overall problem of delay caused by continuances granted to the defense or prosecution, or on the court's own motion. We have alluded above to the undesirability of the ostensible dichotomy in S. 895 as to continuances granted for "good cause" or so that the "ends of justice" may be met, and the provisions excluding only seven days in some instances. Our provision allows the court to grant a continuance for good cause at the request of the defense, the prosecution, or on motion of the court. Good cause is presently the standard used by the federal courts in granting continuances, and we feel it is preferable to retain this standard so as not to introduce confusion into the law.

. . . .

Section 3162(a)(6), excluding the period of delay where the defendant is without counsel, has also been adopted from the Second Circuit Rule. This provision will insure that the delay caused by the defendant's lack of diligence or deliberate dilatory tactics in securing or changing counsel should not work to his advantage.

Section 3162(a)(7) provides for the exclusion of delay caused by continuances granted on stipulation of the parties. Such a continuance could only be granted for a period not to exceed 60 days. This provision protects the frequent desire of defendants to cooperate with law enforcement officials, for example, in bargaining for pleas for lesser offenses.

. . . .

Section 3162(a)(10) allows exclusion of periods of delay caused by exceptional circumstances. This provision was also adapted from the Second Circuit Rule. The types of exceptional circumstances which this provision envisions are those which are obviously unforeseen, and cause the trial preparation or the trial itself to be delayed. Without attempting to be exhaustive, we have listed as examples in the provision the death or other incapacity (*e.g.*, illness, etc.) of the trial judge, intimidation of witnesses, acts of God, or other emergencies. Delays resulting either from the inadequacy of trial preparation by either party or from court congestion would not be excludable under this section.

Clarifying a minor technical problem in S. 895, section 3162(b) permits the court under very limited circumstances to *extend* the time period. On the 180th day, a valid reason may exist for continuing a trial, but at that point, there is no time period from which the delay can be *excluded*, since the 180 days have run. Technically, therefore, if there were a reason for the defense or prosecution to have a continuance granted, no exclusion could be allowed. Thus, in this limited situation, *i.e.*, the 180th day, the court could upon motion of the defendant or prosecution *extend* the time period to cover the continuance delay.

. . . .

As I mentioned above, we think that the provision of S. 895, exempting antitrust, securities and tax cases from the time limits is an undesirable approach to the problem of complex cases. We believe that the purpose of the bill would be better served by exempting cases of extraordinary complexity certified by the Attorney General, as provided for in new section 3163(h). The enumeration of specific statutes to which the time limits should not apply is, we think, an unnecessarily Procrustean approach which would result in the exclusion of some cases not in fact too complex to prepare and the inclusion of some cases which were. By providing that the certification by the Attorney General must be made within 30 days after arraignment, the section precludes a possible prosecutorial abuse of this provision, *i.e.*, where certification would be used as a last-minute maneuver on the part of a prosecutor where he could not meet the 180-day limit.

Letter to Lawrence M. Baskir, Chief Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Bruce D. Beaudin, Apr. 6, 1970, Commenting on Draft of Original Ervin Bill, 1971 Senate Hearings 162

§ 3161 (b) 6 and 7 contain seven-day limits on excludable time upon continuances sought by defense or the U.S. Attorney. It seems that if for good reason there is clear consent by both parties, this is an unnecessarily restrictive position. I would extend the time to at least 30 days.

Letter to Senator Ervin from Judge George L. Hart, Jr., June 22, 1970, at 1971 Senate Hearings 170-71

Section 3161(c)(6), (7), and (8) would take care of most, if not all, justifiable delays that I can conceive of, if properly interpreted,* I suggest that this Section may result in a flood of appeals to [*sic*] both defendants and U.S. Attorneys where they disagree with the Judge's ruling on the delay. The instances are myriad where a Court in various cases will have to make a finding that a continuance should or should not be granted to meet the ends of justice. Every such ruling will present a possible appeal by either the defendant or the Government. I do not know whether there is any way to lessen these appellate possibilities by re-wording or not.

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*Punctuation so in original. Probably should be a period.

Some idea of the problems that will arise are illustrated by a case which was re-assigned to me two days ago from another Judge who became ill. This is the case of *United States* v. *Daniel Brewster, Cyrus T. Anderson and Spiegel, Inc.* The indictment in this case was returned on December 1, 1969. On December 9, 1969, defendant Anderson failed to appear for arraignment and a bench warrant was issued. On December 12, 1969, the Government requested a 1-month continuance for arraignment of Brewster because he was in a hospital in Ireland. The other 2 defendants were arraigned. The defendants Anderson and Spiegel at this time requested 120 days to file written motions and were given until March 2, 1970 to file such motions.

On January 12, 1970, the arraignment of Brewster was continued indefinitely to permit the Government to make necessary physical examinations, Brewster still being in an Irish hospital. On February 24, 1970, Doctors reports on Brewster were filed. Defendant's motion for indefinite postponement of arraignment until his physical condition improved was granted. Motion of defendants Anderson and Spiegel for continuance of trial date until defendant Brewster was able to participate—denied. Motion for defendants Anderson and Spiegel for an additional 30 days from March 2, 1970—granted. Motion of Government to have defendant Brewster moved to United States for additional examination—granted.

May 6, 1970, Counsel for defendant Brewster reported he was in Johns Hopkins Hospital with no medical change and setting of a firm trial date—continued until September, 1970. Time for defendants Anderson and Spiegel to file motions extended to May 20, 1970. Time for defendant Brewster to file motions extended indefinitely.

May 18, 1970—By this time some half-dozen motions filed on behalf of Anderson and Spiegel—Government given until June 24, 1970 to respond to motions and to file motions. Defendants Anderson and Spiegel to reply to Government's motions by July 15 and hearings on motions set for July 27.

May 25, 1970—Defendant Brewster arraigned. Defendant Brewster given until August 1, 1970 to file motions and the Government to reply by October 1, 1970. Trial date was set tentatively for November, 1970.

It will appear from the above that the Trial Court would have had to have made a great number of findings under 3161(c)(8) to date in this case had S. 3936 been the Law. I am sure that you can see that this would have required considerable amount of a Judge's time.

Now that the case has been assigned to me because of the illness of the previous Judge, although I will try to hold a November, 1970 trial date, in view of certain motions to produce, etc., that have been filed in the case, I can foresee that there will be much further delay before this Court can force this case to trial.

Letter to Senator Ervin from Judge Edwin M. Stanley, Sept. 23, 1970, at 1971 Senate Hearings 197

I would like to see conspiracies added to the list of exempt cases under § 3163(b). These cases are usually protracted, and it is not uncommon to take from one to two weeks to try them.

Letter to Senator Ervin from Robert G. Polack, Oct. 8, 1970, at 1971 Senate Hearings 177

I am at a loss to understand why there should be an exception in Section 3163(b) (Lines 16 and 17, Page 7) of defendants charged with offenses filed under the antitrust, securities, or tax laws. It would seem to me that anyone charged with such offenses should be entitled to the same privileges as those charged with other types of offenses.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 178

(2) Related to the above observation [that a 60-day limit is too restrictive] I would suggest that were the 60 day time period adopted we might justifiably fear that the bill's extension provision (Sec. 3161(c)(8)) would become the rule rather than as intended, the exception. Assuming such a circumstance we would in effect be bringing about that intended to be alleviated by the bill—i.e., an additional burden on our criminal law system occasioned by additional hearings and demands on the ingenuity to dream up excuses for delay.

(3) Related to Sec. 3161(c)(8), the "ends of justice" continuance provision, it should be anticipated that this provision might be used as a complete and total escape from the provisions of the bill. Assuming, as suggested in No. 1 above, that the initial time period be enlarged this provision would become less necessary and should accordingly become less available. To this end I would specifically suggest thought be given to incorporating in this "ends of justice" continuance provision a self-imposed time limit of 30 days for such continuances, further providing that each subsequent continuance be given only for a period of 30 days, at which time a reconsideration and additional findings by the court would be required.

(4) In obtaining a Sec. 3161(c)(8) "ends of justice" continuance, it should be required that the court set forth specific findings or reasons for granting the continuance—i.e., the pendency of another case which might render this trial moot, the pendency of a related and controlling ruling in the Appellate or U.S. Supreme Court, or possibly the pendency of other cases involving the same defendant which could effect [*sic*] the possibility of trial. Having set forth such findings in writing, assuming either the prosecution or the defense disagree they should be permitted an expeditious appeal solely addressed to this issue and to the extent possible not encumbered by some of the formal procedures and delays inwoven in the appellate process.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 178

I believe the bill could be more specific in emphasizing that once a trial date has been set it should not and cannot be continued without the agreement of the judge, prosecutor and defense attorney, and then only if and when that agreement is reached a reasonable time prior to the date set for the trial—i.e., one week. I fully agree that trial delays and procrastinations are generally caused by the attorneys involved in a case. Unfortunately the optimistic anticipation of obtaining a continuance becomes the accepted way of practice. Thus, only legislation such as contemplated in S. 3936 will and can effect the necessary change in this attitude.

Letter to Senator Ervin from Barbara Allen Bowman, Nov. 30, 1970, at 1971 Senate Hearings 163

Also in the opening paragraph [of section 3161(a)] is the provision for trial setting at first appearance. One of the major causes for delay is the crowded schedules of some defense attorneys. Perhaps, the bill should provide that if the defense attorney cannot be reasonably ready for trial within the sixty day period, that other counsel be appointed, if the client is indigent, or in the case of retained counsel that the client be directed to seek other counsel and report back to the court within a given period.

Letter to Senator Ervin from Barbara Allen Bowman, Nov. 30, 1970, at 1971 Senate Hearings 163

3161(c)(8) seems to me too great an escape valve. I think some provisions [*sic*] should be made for review of the court's written reasons for granting the continuance. For example, "If such continuances have been granted and on appeal after conviction the defendant raises denial of speedy trial, any continuance granted for reasons not deemed sufficient by the appellate court shall be counted prejudicial delay in passing on the speedy trial claim."

Letter to Senator Ervin from Laurence H. Tribe, Dec. 2, 1970, at 1971 Senate Hearings 200

[I]t may not be realistic to adhere to a sixty day standard limit between arrest, indictment or information and actual trial date. The danger in positing such a laudable, though possibly unattainable, goal is that continuances will become the rule rather than the exception and that the numerical limit will lose any effective meaning. If judges routinely granted such continuances, the statute might not provide any effective change from the present lengthy trial delays. The statute's requirement that the Court consider the interest of the defendant and the public and "set forth in writing in the record of the case its reason for granting such continuance," could not effectively limit routine continuances when they were necessary as a matter of course. Consequently, it would seem more practical to follow the Crime Commission's recommendation of a four month standard, rather than sixty days, between arrest and trial.

Letter to Senator Ervin from Judge Tim Murphy, Jan. 18, 1971, at 1971 Senate Hearings 185

A rather common technique by the sophisticated criminal also is to retain a lawyer engaged in a protracted trial, thus guaranteeing long continuances. This has occurred recently in trials in the District of Columbia, and I have been told that it is a common tactic in the so-called "political trials" to hire certain lawyers who are always engaged elsewhere.

The argument that a person has the right to counsel of their own choosing when retained can cause serious difficulties. Your bill should provide that retained counsel will not be permitted to enter appearances unless they certify that they will be available for trial within the trial limit. I have never felt that the right to counsel means the right to have counsel of one's own choosing who cannot be available for calendaring of cases for trial.

Letter to Senator Ervin from Judge Albert Lee Stephens, Jr., Mar. 4, 1971, at 1971 Senate Hearings 198

The next point I would like to make is that many federal offenses are of an extremely serious nature, particularly in the field of narcotics and postal robberies where long mandatory minimum sentences are prescribed by law. In our district witnesses have been killed to prevent a successful prosecution. Government witnesses in narcotics prosecutions are likely to be unstable and also more concerned with their own safety than with the fate of the accused. They are tempted to absent themselves and this temptation is particularly strong if the case might be dismissed because of only a slight delay. You provide exceptions based upon a judicial finding that the ends of justice cannot otherwise be met. Such a finding must, of course, be based upon a sufficient showing and credible evidence. No one quarrels with this principle but such evidence may only be available at the expense of exposing a key witness or informer. These are serious considerations.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 44

Sanctions alone are not necessarily sufficient to commit the system to speedy trial. There will not be dramatic movement toward speedy trial unless both the courts and the prosecutor's office are covered by the time limits. This is not the case in most of the time limits schemes examined by the committee. Cases in point are the Second Circuit rule and the statute recently adopted in New York. In both, time limits plus a dismissal sanction have been adopted, but the sanction applies only where the prosecutor is not ready for trial within the time limits. The "ready rule" means that even if the prosecution is prepared to go to trial but the court is so congested that it cannot provide a judge to hear the pretrial motions or the trial itself, the sanction cannot be applied. The effect of this provision is to allow court congestion to nullify the speedy trial rules. Other speedy trial plans allow for suspension of the time limits and sanctions for "good cause". This has also been interpreted to excuse court congestion. S. 895 is drafted in such a way as to avoid these pitfalls. Under the bill as reported by the committee the dismissal sanction applies even if there is court congestion, for that is the very problem the bill is designed to address.

1972 Draft Senate Committee Report, at 1973 Senate Hearings 36, 45

According to Whitney North Seymour, Jr., U.S. Attorney for the southern district of New York, perhaps the busiest U.S. district in the country, prosecutors in his office are ready for trial within 60 days of arrest in all "short trial" cases. These cases comprising "the overwhelming bulk of cases" in his district, are defined as cases which can be tried within 3 court days. Because of this and other evidence, the committee has reached the conclusion that the goal of speedy trial is to reduce the period between arrest and the commencement of trial to 60 days in the typical Federal criminal prosecution. The purpose of S. 895 is to achieve that goal within 3 years of enactment.

. . . .

. . . In the Southern District of New York, also one of the six or seven busiest Federal districts, the U.S. prosecutor is ready for trial within 60 days of arrest in the typical criminal case—the type intended to be covered by S. 895.

1972 Draft Senate Committee Report, at 1973 Senate Hearings 52-54

"ENDS OF JUSTICE" CONTINUANCE.—Subparagraph 3161(c)(8) is the heart of the speedy trial scheme created by S. 895. It allows for the necessary flexibility to make 60-day trials a realistic goal within 3 years of enactment.

The provision represents considerable revision by the committee. The original provisions of S. 895 dealing with general continuances, 3161(c)(6), (7) and (8) set a dual standard for continuances—in some cases continuances would have been permitted for "good cause" and in some cases to meet the "ends of justice." The original provisions also only allowed 7-day continuances for "good cause." The Department of Justice as well as many other commentators and witnesses found the provisions unnecessarily complicated and confusing. Therefore the committee consolidated all of the continuance provisions into one provision, 3161(c)(8) of the bill as reported.

The new provision eliminates the words "good cause" and simply adopts the stiffer "ends of justice" standard—a standard which was used in the original bill for those situations which could not fall within the "good cause" continuance provisions. "Ends of justice" is the standard found in section 3651 of title 18 of the United States Code in reference to suspension of sentence and the granting of probation. In essence, the new provision allows a judge to grant a continuance only where he finds that the "ends of justice and the best interest of the public as well as the defendant would be served thereby." This means that in each case where a continuance is requested, and the factual situation does not fall within 3161(c)(1) through (7), the judge must determine before granting the continuance that society's interest in meeting the "ends of justice" outweighs the interest of the defendant and of society in achieving speedy trial. Furthermore the judge must set out in writing his reasons for believing that in granting the continuance he strikes the proper balance between these two societal interests.

Although it is intended that continuances under 3161(c)(8) should be given only in unusual cases, it is anticipated that the provision will be necessary in many protracted and complicated Federal prosecutions, that is antitrust cases, and complicated organized crime conspiracy cases. However, the committee has rejected a blanket exception for these cases and opted for a case-by-case approach (see p. —). Each time such a continuance is granted in a complicated case the judge will still have to weigh the right of society and the defendant to a speedy trial against the "ends of justice". For example, although a case like the alleged conspiracy involving the so-called "Watergate case" might normally be subject to a continuance under this provision because of its complexity, society's interest in a speedy trial because of the then upcoming election might have outweighed that consideration. Of course, another option open to the judge in that case, were S. 895 the law, would have been to sever the burglary charges from the conspiracy case, and of course a continuance would not have been appropriate in the simple burglary case.

There are several fairly objective factors that a judge might consider in determining whether to grant a continuance under this provision because of the complicated nature of the case. None of these factors alone should be sufficient to grant a continuance. A judge might attempt to determine through conferences with defense and government counsel the number of days of trial which will be required to present the evidence in the case. For example, in the Southern District of New York, the U.S. attorney is ready for trial within 60 days of arrest for all "short trial" cases—cases which will take less than 3 days to try. Such a fairly reasonable rule of thumb might be used under section 3161(c)(8). A continuance would be more appropriate in a case which is likely to take more than 3 days to try than in one which will take less than 3 days.

Another fairly objective indicator of case complexity is the weighted caseload. This is a formula which has been used by the Federal judiciary to measure the complexity of cases for the purpose of determining the true workload for each district so that Congress can know when a new judgeship should be created. The formula is based on a periodic time study by the Federal Judicial Center which analyzes the actual amount of time spent on different kinds of cases. A new index was completed in May of 1971. [Footnote omitted.] It would be very appropriate to grant continuances under section 3161(c)(8) for a bribery case which has a weighted caseload index of 5.94, while in the typical auto theft case where the index is only .63, a continuance based on complexity would not be appropriate.

Another situation in which a continuance under this provision would be appropriate would be where there is a complicated factual determination to be made in a pretrial hearing. For example, in a very simple narcotics case there may be serious search and seizure questions raised by a wiretap. The more complicated the evidence presented in such a hearing, the more appropriate it would be for a judge to continue the case *sua sponte* to analyze the facts surrounding the contested search.

A third situation in which a continuance would be clearly appropriate is where continuation in the proceedings would either be impossible or a miscarriage of justice; for example, where the judge trying the case is ill, defense counsel or defendant is ill, or the court allows defense counsel to resign from the case or removes counsel.

Continuances under this provision might also be allowed in a case involving continuing criminal activity, such as an organized crime or internal security conspiracy in which the prosecution has no real choice in commencing prosecution because the police have decided to arrest the defendant for the purpose of stopping the criminal activity. In most other cases, the continuance provision should not be used to give the prosecution time to gather evidence because the Government should not initiate prosecution until it is ready to move fairly rapidly to trial.

However, as a general matter the committee intends that, except for the above situations, this provision should be rarely used. Furthermore, even the above situations should be handled on a case-by-case basis with the court stating in writing the reasons why it believes that granting the continuance strikes the proper balance between the ends of justice on the one hand and the interest of society and the interest of the defendant in a speedy trial on the other.

It is assumed that the denial of a continuance under this subsection or any part of 3161(c) would not be appealable as an interlocutory matter. However, the question of the improper granting or denial of a continuance would be a proper question for review on the granting of a motion to dismiss under section 3162 of the act or on review of a conviction after such motion was denied. This provision is, however, not intended to give the prosecution any right to appeal that it does not already enjoy under the Criminal Appeals Act.

1972 Draft Senate Committee Report, at 1973 Senate Hearings 55-56

The commentary in the draft report about eliminating the exclusion in the bill for antitrust, securities, and tax cases was virtually identical to the commentary at page 44 of the 1974 Senate committee report, set forth below (p. 163).

1972 Draft Senate Committee Report, at 1973 Senate Hearings 57

The whole District plans section has been altered considerably from the provision as it appeared in S. 895 as introduced. For example the original provision permitted extensions of time for a district to prepare for the imposition of the 60-day time limits and allowing [*sic*] for a suspension of section 3163, the sanctions provision, if a district was unable to comply with the provision.* The committee dropped both the extension and the exemption provision because of testimony before the Subcommittee on Constitutional Rights that these provisions would be used as a loophole by some districts to avoid application of the time limits. In the place of the extension and suspension provisions the committee adopted section 3164 on interim limits and section 3161(b)(1)(B) which delays the imposition of the 60-day time limits until 3 years after enactment. Furthermore any unforeseen emergency which might call for a suspension of the speedy trial time limits would certainly fall within the "ends of justice" continuance provision, 3161(c)(8).

Memorandum Explaining Differences Between S. 754 and S. 895, Accompanying Remarks of Senator Ervin on Introducing S. 754, 119 Cong. Rec. 3267 (Feb. 5, 1973)

Section 3163 of S. 895 had provided a blanket exemption from the time limits for certain complex cases such as antitrust cases and organized crime conspiracy cases. The Subcommittee dropped that provision as a result of criticism by several witnesses who suggested that the provision would be abused. However, complicated cases would still be subject to much more lenient time limits because unusual complexity would be the grounds for a continuance under subsection 3161(c)(8). Therefore, under the new provision complicated cases would be exempted from the time limits on a case-by-case basis rather than under a blanket exemption.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 169

The following new paragraph was suggested:

> (B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) the number of days of trial which will likely be required to present the evidence in such case;
>
> (ii) the complexity of the case;
>
> (iii) the complexity of the factual determinations to be made in a pretrial hearing in such case;
>
> (iv) whether the failure to grant such a continuance in the proceedings would be likely to make a continuation of such proceeding impossible, or to result in a miscarriage of justice, such as where the judge trying the case is ill or unable to continue, defense counsel or defendant is ill, or the defense counsel has been permitted by the court to resign from the case, or the court has removed counsel from the case; and

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*So in original. Not an accurate description of S. 895.

(v) whether the case involves a continuing criminal activity, such as an organized crime or internal security conspiracy, in which law enforcement officers felt compelled to arrest the defendant for the purpose of stopping the criminal activity.

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 165

Under S. 754, as now drafted, the provisions of the bill provide for exclusion from the sixty day period, time resulting from a continuance based on the "ends of justice and the best interest of the public as well as the defendant * * *" [§ 3161(c)(8)].*

This amendment would explicitly define the test for granting the continuance to include, but not be limited to, the sorts of examples set out in the draft Committee Report . . . .

It can be argued that the bill ought to give the courts the maximum degree of guidance in determining the meaning of this key concept.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 114

[S. 754] omits any provision for special consideration of complex cases. In the memorandum accompanying S. 754, the subcommittee stated that the complex case exemption of S. 895 was deleted because several witnesses suggested to the subcommittee that a blanket exemption would be abused and that S. 754 would cure this defect by providing for continuance in cases of unusual complexity. Proposed section 3161(c)(8) in S. 754 permits a court to grant continuances that serve "the ends of justice and the best interest of the public and the defendant." But how could a court ever have a rational basis for finding, as it must, that a continuance at the request of the Government would serve "the best interest of * * * the defendant,"† since expiration of the mandatory time limit would lead to dismissal of the charges against him? Conversely, the same test strongly favors the granting of virtually every defense motion for a continuance.

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 115

If a judge becomes seriously ill and continues the case on his own motion beyond the time limit, and forgets or is prevented by a terminal illness to state for the record his findings that the continuance was warranted under the terms of the bill, dismissal of the case would be mandatory.

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*Ellipsis and brackets in original.

†Ellipsis in original.

320-917 O - 80 - 11

Testimony of Deputy Attorney General Joseph T. Sneed, 1973 Senate Hearings 123, 125

[Senator HRUSKA.] Now, Dean, you have indicated that there is difficulty with that language because it would be hard for the court to have a rational basis for finding that the "ends of justice and the best interest of the public as well as the defendant would be served thereby." It is noted that that phrase is connected with conjunctives and not disjunctives. Would that subsection be helped or hurt by putting "ors" in there instead of "ands" at the proper places?

Mr. SNEED. I think it would be helped, sir.

Senator HRUSKA. Would it then be subject to the objection by those who were heard to say before and who I believe will be heard to say it again, that it is a blanket exemption and therefore they don't want it? Do you think there is that likelihood?

Mr. SNEED. That likelihood may well exist.

Senator HRUSKA. It seems that when one says that any period of delay will not be counted toward the proscribed* time limitation in the interest of the ends of justice, that opens a big doorway, doesn't it? The way the bill now reads it has to be that the ends of justice, the best interest of the public and the best interest of the defendant are all served thereby.

Now, the best interest of the defendant would not necessarily be the best interest of the public or the ends of justice. The defendant's interest is to get out of the toils of the law.

Mr. SNEED. I think that is correct, and Mr. Thompson could comment on that more pithily than I can.

. . . .

Senator HRUSKA. Dean Sneed, on its face this bill makes no provision for the exclusion from the 60-day rule of complex cases.

Mr. SNEED. That is correct.

Senator HRUSKA. We know there are complex cases, antitrust cases, tax cases, organized crime cases, conspiracy cases. Section 3161(c)(8) does make some effort, apparently, to carve out an exemption, but in its present form, as I have already indicated, I wouldn't have much faith in it. To clarify it would probably risk the objection of people who don't want a blanket exemption.

However, is there some way of adding language and outlining factors that belong in complex cases or specifying the nature of the case that could be drafted into this legislation which would be helpful to insure that a complex case is given extra consideration over a relatively simple case?

Mr. SNEED. Senator, I am not at all certain that it can be done. My legislative drafting instinct tells me it would be an extremely difficult thing to do. There is always one way out of the problem, and that is to make provision in the law for such cases to be subjected to judicial determination as to whether or not they should be excepted.

But legislation attempting to identify the full range of complex cases, I think, would be a drafting nightmare.

Testimony of U.S. Attorney James R. Thompson on Behalf of the Department of Justice, 1973 Senate Hearings 130-31

[Mr. GITENSTEIN.] On this complexity question, what would you define as a complex case? Would you use the criteria of the projected length of trial? If a case would take more than 3 days to try, would you consider that a complex case? This is the criteria followed by the U.S. Attorney for the Southern District of New York.

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*So in original. Probably should be "prescribed."

Mr. THOMPSON. I am not sure that that is a satisfactory criterion, because the complexity of the case may not be apparent on the face and the complexity of the case may not have anything to do with how long it takes to try. For example, a case may become complex because of pretrial motion and it is the pretrial preparation which makes it complex. When it gets to trial it turns out to be shorter, because of the pretrial motions and pretrial preparation, than anybody thought.

Mr. GITENSTEIN. If you loosened up exclusions for pretrial motions in the bill to address that problem, that would take care of that one factor; wouldn't it?

Mr. THOMPSON. It might take care of that one factor, but other factors would arise. I don't think you can label complex cases. We had a Dyer Act case that took 10 or 12 days. It was a complex Dyer Act case involving a car that had been stolen, and parts of it were put on another car that had legitimately been claimed. Murder was committed during the course of that Dyer Act crime. . . .

I am not at all sure you couldn't make exceptions for complex cases and then list a number of factors which a judge could take into account in determining whether or not a case was complex, perhaps even a provision for certification by the processing* authority. Judges are creative and imaginative, and I don't think that they are unable to make a judgment about the complexity of the case, at least insofar as whether it can be speedily tried.

If the courts can reach a decision with input of the prosecuting attorney whose input would be valuable because he has lived with this case longer than anybody else, you would not have a loophole through which judges could or would be eager to drive a truck.

Mr. GITENSTEIN. If you made such a legislative change, what portion of the cases would fall in your category of complex cases and noncomplex? How does your caseload break down?

Mr. THOMPSON. I think our example would be atypical, as I say. But each prosecutor's office, even the Federal system, bears the stamp of the individual attorney. It is his personal priorities by and large which govern the priorities of the office, although the priorities of the Department of Justice must be factored into that, too. But individual prosecutors can use their freedom. Cases involving official corruption louse up your statistics because they include an inordinate number of defendants who can't be relied upon to plead guilty, but I don't think our example would be typical.

Mr. GITENSTEIN. Assume that we use the criteria of 3-day trials, and apply more flexible speedy trial time limits to cases which will take more than 3 days. The statistics which the Administrative Office of the U.S. Courts collects suggest that about one-seventh of all Federal cases that go to trial take more than 3 days, suggesting that six-sevenths of the cases are noncomplex cases and would be subject to tougher speedy trial provisions.

Mr. THOMPSON. I would be very surprised at those statistics. I haven't seen them or the statistics from our office but my impression from being the U.S. attorney and trying to keep ahead of the cases that go to trial—last week we had 5 separate cases go to trial, which is a high number with only 11 judges sitting—and using Mike Seymour's rule would lead me to believe that a majority of our cases would be complex cases.

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*So in original. Probably should be "prosecuting."

Letter to Judge Walter E. Craig from Senator Ervin, May 16, 1973, at 1973 Senate Hearings 215

Your second concern relates to the sanction of dismissal and the shortness of the 60 day limits. The time limits are designed as a norm for the average non-complex federal criminal case, not for complex narcotics conspiracy or antitrust cases. The legislative history of Section 3161(c)(8) will reflect the intent of the drafters that a court could grant a continuance to meet the "ends of justice" where a case was overly complex.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 192-93

The following comments, although written after subcommittee approval of the bill, were apparently based on a draft submitted to the Justice Department beforehand:

> Provision was made in proposed Section 3163(b) as originally drafted,* to exempt certain complex cases from the time limitations of the bill, but because complex cases cannot be easily categorized or identified by labels, the Department recommended that there be a general provision exempting cases of extraordinary complexity regardless of the statute under which they arise. Unlike S. 895, the proposed amendment fails to include any provision for the preparation and trial of complex cases. We strongly suggest that provisions be made for an exemption from the sixty-day time limit of complex cases and again recommend the following language for insertion in the proposed legislation:
>
> > "This chapter shall not apply to any cases where the Attorney General of the United States certifies to the court within 30 days after arraignment that the case is one of extraordinary complexity."

Letter to Mark Gitenstein, Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Richard A. Hauser, Attorney-Advisor, Office of Criminal Justice, U.S. Department of Justice, June 12, 1973, at 1973 Senate Hearings 196

The Deputy Attorney General also pointed out in his testimony that if an essential government witness is unavailable on the 59th day, there was nothing in S. 754 to prevent dismissal of the case on the 60th day. The problem becomes more acute when expert witnesses are involved because their presence may be required in different courts on the same day. Unjustified dismissals could be avoided by adding the following language to Section 3161 (c)(1)(A): "(vii) delay resulting from the absence or unavailability of an essential witness." The same result could be achieved by adding "or an essential witness" after "defendant" in Section 3161 (c)(3)(A) and by making the necessary conforming changes in Subsection (B).

Moreover, in order to prevent unwarranted dismissals, I would suggest that you consider amending Section 3161 to give the court the authority to extend the time limitations where events otherwise justifying exclusion occur but no additional excludable time remains before expiration of the time limits.

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*Refers to original Ervin bill.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 3

BALANCING TEST FOR DETERMINATION OF ALLOWABLE EXCLUSIONS FROM THE SPEEDY TRIAL TIME LIMITS.—At the suggestion of Senators McClellan and Hruska section 3161(h)(8) has been amended in order to specify the factors which a judge should consider when determining whether to grant an exclusion from the speedy trial time limits. This section now specifies that a judge should use a balancing test in order to make this determination. The judge must find that the "ends of justice" outweigh the interest of the defendant and society in a speedy trial.

1974 Senate Committee Report 5

Section 3163 of S. 895 as introduced had provided a blanket exemption from the time limits for certain complex cases such as antitrust cases and organized crime conspiracy cases. The Subcommittee dropped that provision as a result of criticism by several witnesses who suggested that the provision would remove the impetus to speed up those cases at all. However, complicated cases would still be subject to much more lenient time limits because unusual complexity would be the grounds for a continuance under subsection 3161(h)(8). Therefore, under the new provision adopted in October 1972 and retained in S. 754 complicated cases would be exempted from the standard time limits and given special individualized limits in lieu thereof by court order on a case-by-case basis.

1974 Senate Committee Report 8, 24

According to Whitney North Seymour, Jr., former United States Attorney for the Southern District of New York, perhaps the busiest United States district in the country, prosecutors in his office are ready for trial within 60 days of arrest in all "short trial" cases. These cases comprising "the overwhelming bulk of cases" in his district, are defined as cases which can be tried within 3 court days. Because of this and other evidence, the committee has reached the conclusion that the goal of speedy trial should be to reduce the period between arrest and the commencement of trial to 90 days in the typical Federal criminal prosecution. The purpose of S. 754 is to achieve that goal within 7 years of enactment.

. . . .

. . . In the Southern District of New York, also one of the six or seven busiest Federal districts, the United States prosecutor is ready for trial within 60 days of arrest in the typical criminal case—the type intended to be covered by S. 754.

1974 Senate Committee Report 21

Enactment of S. 754 would represent Congress' judgment that the Sixth Amendment requirement of speedy trial is to be defined as trial within 90 days of arrest for the average noncomplex criminal case.

1974 Senate Committee Report 21

The bill does more, of course, than merely impose prosecution limits on the Federal criminal trial. It has carefully constructed exclusions and exceptions which permit normal pre-trial preparation in the ordinary noncomplex cases which represent the bulk of business in the Federal courts. The bill also accommodates complex cases which require long periods of preparation by prosecutors and defense counsel. While the bill does not automatically exclude certain criminal trials by type, it does set forth a method by which the complex case can be identified. The bill also provides for unusual circumstances which may demand exceptions to the normal time limits. In order to avoid the pitfalls of unnecessary rigidity on the one hand, and a loop-hole which would nullify the intent of the legislation on the other, a balancing test is established in order to enable the judge to determine when the "ends of justice" require an extraordinary suspension of the time limits.

1974 Senate Committee Report 22

Sanctions alone are not necessarily sufficient. There will not be dramatic movement toward speedy trial unless both the courts and the prosecutor's office are covered by the time limits. This is not the case in most of the schemes which the Committee has examined. Cases in point are the Second Circuit rule and the statute recently adopted in New York. In both, time limits plus a dismissal sanction have been adopted, but the sanction applies only where the prosecutor is not ready for trial within the time limits. The "ready rule" means that even if the prosecution is prepared to go to trial the sanction cannot be applied if the court is so congested that it cannot provide a judge to hear the pretrial motions or conduct the trial. The effect of this provision is to allow court congestion to nullify the speedy trial rules. Other speedy trial plans allow for suspension of the time limits and exclusions for "good cause" which has been interpreted to include court congestion. S. 754 is drafted in such a way as to avoid these pitfalls. Under the bill the dismissal sanction applies even if there is court congestion, for that is the very problem the bill is designed to address.

1974 Senate Committee Report 32

While the Committee has concluded that it is necessary to minimize the delays currently experienced during the arrest to indictment period, it recognizes that complexity of the grand jury process sometimes leads to unavoidable delays. For this reason, the time limits imposed by this subsection are subject to special tolling provisions as provided in subsection 3161(h). For example subsection 3161(h)(8) specifically provides that grand jury proceedings which are sufficiently complex are to be exempt from the arrest to indictment time limits.

1974 Senate Committee Report 35

Subsection 3161(h) excepts from the time limits imposed in Subsections 3161(b) and (c) the following periods of delay:

. . . .

> (8) Any other delay resulting from a continuance granted at the request of defense or prosecution upon a finding of the judge that the ends of justice cannot be met unless the continuance is granted. The judge must bal-

ance the right of the defendant and the interest of the public in speedy trial against the "ends of justice", and set forth in the record his reasons for granting the continuance.

1974 Senate Committee Report 39-41

Subparagraph 3161(h)(8) is the heart of the speedy trial scheme created by S. 754. It allows for the necessary flexibility to make 90 day trials a realistic goal within seven years of enactment.

The provision represents considerable revision by the committee. The original provisions of S. 895 dealing with general continuances, set a dual standard for continuances—in some cases continuances would have been permitted for "good cause" and in some cases to meet the "ends of justice." The original provisions also only allowed seven day continuances for "good cause." The Department of Justice as well as many other commentators and witnesses found the provisions unnecessarily complicated and confusing. Therefore the committee consolidated all of the continuance provisions into one provision, 3161(h)(8) of the bill as reported.

The new provision eliminates the words "good cause" and simply adopts the stiffer "ends of justice" standard—a standard which was used in the original bill for those situations which could not fall within the "good cause" continuance provisions. "Ends of justice" is the standard found in section 3651 of title 18 of the United States Code in reference to suspension of sentence and the granting of probation. In essence, the new provision allows a judge to grant a continuance only where he finds that the "ends of justice" outweigh the best interest of the public and the best interest of the defendant in speedy trial. This means that in each case where a continuance is requested, and the factual situation does not fall within 3161(h)(1) through (7), the judge must determine before granting the continuance that society's interest in meeting the "ends of justice" outweighs the interest of the defendant and of society in achieving speedy trial. Furthermore the judge must set out in writing his reasons for believing that in granting the continuance he strikes the proper balance between these two societal interests.

Although it is intended that continuances under 3161(h)(8) should be given only in unusual cases, it is anticipated that the provision will be necessary in many protracted and complicated Federal prosecutions, that is antitrust cases, and complicated organized crime conspiracy cases. However, the Committee has rejected a blanket exception for these cases and opted for a case-by-case approach (see p. 44). Each time such a continuance is granted in a complicated case the judge will still have to weigh the right of society and the defendant to a speedy trial against the "ends of justice." For example, although a case like the alleged conspiracy involving the so-called "Watergate case" might normally be subject to a continuance under this provision because of its complexity, society's interest in a speedy trial in light of the then upcoming election might have outweighed that consideration. Of course, another option open to the judge in that case, were S. 754 the law, would have been to sever the burglary charges from the conspiracy case, and of course a continuance would not have been appropriate in the simple burglary case.

The original "ends of justice" provision contained in S. 754 was vague even when construed in light of the accompanying legislative history. Therefore, upon the suggestion of Senators Hruska and McClellan and the Justice Department, subsection 3161(h)(8) has been redrafted to reflect the Committee's clear intention that the determination of whether or not to grant an exclusion is to be via a balancing test. Before establishing a special, more lenient set of limits, a court would have to determine that the "ends of justice" outweigh the defendant's and society's interest in speedy trial. Also, the section as amended by the Committee sets out, in the statutory language, the specific factors which a judge should consider when weighing these interests. This is designed to give the courts the maximum degree of guidance in interpreting this critical provision.

The new provision suggests three factors which a judge may consider in determining whether to grant a request for a special set of limits. First, it would be appropriate if the judge determines that failure to do so would make "continuation of such proceeding impossible, or result in a miscarriage of justice." For example, the following circumstances would be sufficient to warrant the granting of an "ends of justice" extension: where the judge trying the case, the attorney for the Government, defense counsel, the defendant or an essential witness is ill or unable to continue, or the defense counsel has been permitted by the court to resign from the case, or the court has removed counsel from the case.

A second factor which the amended section would permit the judge to consider is the overall complexity of the case. The court would rely on its own experience but also upon objective indicators of complexity when granting an "ends of justice" extension.

There are several fairly objective factors that a judge might consider in determining whether to grant a continuance under this provision because of the complicated nature of the case. None of these factors alone should be sufficient to grant a continuance. A judge might attempt to determine through conferences with defense and government counsel the number of days of trial which will be required to present the evidence in the case. For example, in the Southern District of New York, the United States attorney is ready for trial within 60 days of arrest for all "short trial" cases—cases which will take less than three days to try. This rule of thumb might be used under section 3161(h)(8). Therefore a continuance would be more appropriate in a case which is likely to take more than three days to try than in one which will take less than three days.

Another objective indicator of case complexity is the weighted caseload. This is a formula which has been used by the Federal judiciary to measure the complexity of cases for the purpose of determining the true workload for each district so that Congress can know when a new judgeship should be created. The formula is based on a periodic time study by the Federal Judicial Center which analyzes the actual amount of time spent on different kinds of cases. A new index was completed in May of 1971. [Footnote omitted.] It would be very appropriate to grant continuances under section 3161(h)(8) for a bribery case which has a weighted caseload index of 5.94, while in the typical auto theft case where the index is only .63 a continuance based on complexity would not be appropriate.

The third factor to be used by the judge in determining whether to grant a continuance under this subsection is related to the second. It would permit an exclusion where proceedings become stalled in grand jury because of the "unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the government." This provision is specifically designed to deal with the situation where arrest precedes indictment thus commencing the time limits but grand jury proceedings become stalled. It is not designed to cover every situation where grand jury proceedings are delayed—only where the delay was caused when an unusual amount of new or complex evidence is [*sic*] elicited in those proceedings. The more complicated the evidence presented, the more appropriate it would be for the judge to allow a continuance.

A grand jury continuance might be appropriate in a case involving continuing criminal activity, such as an organized crime or internal security conspiracy in which the prosecution has no real choice in commencing prosecution because the police have decided to arrest the defendant for the purpose of stopping the criminal activity. In most other cases, the continuance provision should not be used to give the prosecution time to gather evidence because the Government should not initiate prosecution until it is ready to move fairly rapidly to trial.

However, as a general matter the Committee intends that, except for the above situations, this provision should be rarely used. Furthermore, even the above situations should be handled on a case-by-case basis with the court stating in writing the reasons why it believes that granting the continuance strikes the proper balance between the ends of justice on the one hand and the interest of society in a speedy trial and the interest of the defendant in a speedy trial on the other.

It is assumed that the denial of a continuance under this subsection or any part of 3161(h) would not be appealable as an interlocutory matter. However, the question of the improper granting or denial of a continuance would be a proper question for review on the granting of a motion to dismiss under section 3162 of the act or on review of a conviction after such motion was denied. This provision is, however, not intended to give the prosecution any right to appeal that it does not already enjoy under the Criminal Appeals Act.

1974 Senate Committee Report 44

An important difference between the original section 3163 contained in S. 895 and the new version is that the latter would eliminate the exclusion of antitrust, securities, and tax cases from the act. As Mr. Rezneck suggested, it is these very cases that are responsible for the egregious delays in the Federal courts. In Rezneck's words:

> In almost all such cases, the bringing of a criminal charge follows a long government investigation, involving extensive grand jury proceedings. The defendant also is well aware of the possibility of prosecution and has substantial time to prepare his case even before the formal institution of prosecution. No doubt more time for trial preparation may be required for some of these cases because of their complexity, but the continuance provisions of the Act can make allowance for such cases on an appropriate showing of good cause. A case-by-case approach to such problems is preferable to a blanket exemption for any class of cases.

This is essentially the approach taken by the Committee in its amendment to section 3163 and the "ends of justice" continuance provision, 3161(h)(8) where complex cases would be subject to a case-by-case continuance (see pp. 38-41).

Testimony of Senator Ervin, 1974 House Hearings 171

[Mr. COHEN.] Just one final question. I notice on page 9 of the bill where we talk about a dismissal for failure to prosecute the case, where the burden is then shifted to the Government to demonstrate and present compelling evidence as to the exceptional circumstances as to why the case cannot be concluded, and it is stated that "Exceptional circumstances shall not mean general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses."

I am wondering from all practical points of view what would constitute exceptional circumstances in your own mind?

Senator ERVIN. I would think the death of a witness and the apparent unavailability of further evidence at that particular time would be an exceptional circumstance, or perhaps under certain circumstances death of a counsel in the case who had prepared the case for trial.

Mr. COHEN. So what you are saying is failure to obtain an available witness is not so broad as to include the death of a witness. In other words, if a witness died and there was need to obtain an additional witness that further time would not be precluded by the language in section 3162(b)?

Senator ERVIN. In other words, it was unforeseeable at the time.

The reason we put it in this way was because I could conceive of many exceptional circumstances that might arise that we would not think of if you tried to define them. So we tried to define what is not an exceptional circumstance rather than trying to include a definition of what are exceptional circumstances.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 201

At page 6, lines 24 and 25, and at page 7, lines 6 and 7, amend section 3161(h)(8)(A), by inserting at the end of line 24, page 6, the word "are" and by striking, on line 25, page 6, the words "outweigh the best interest," and inserting in lieu thereof the words "after giving due consideration to the interests," and on page 7, line 6, insert the word "are" between the words "justice" and "served", and on line 7 strike the words "outweigh the best interest," and insert the words "after giving due consideration to the interests," so that the amended section will read as follows:

> "(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served* by taking such action after giving due consideration to the interests of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice are served by the granting of such continuance after giving due consideration to the interests of the public and the defendant in a speedy trial."

Comments

The above language is preferred inasmuch as it has frequently been used as a legal standard.

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*So in original. Should read "are served."

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 202

At page 9, lines 15 and 16, amend section 3162(b) by striking the words "general congestion of the court's docket."

Comments

We do not believe that the public interest in trying criminals should be defeated by the general congestion of the court's docket.

Testimony of Earl Silbert, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 210-11

While most of the cases, Mr. Chairman, particularly the simple kind, can be processed within the time limit set by this statute, the most important kinds of cases in the Federal system that one would be encouraged to prosecute, your fraud cases, your conspiracy cases, your major organized crime cases, require additional time.

Now, admittedly in the statute there is an exception for the so-called complex case. But what is the complex case? And should it be analyzed only under the concept or definition of a complex case as opposed to what we believe is the fair way to proceed, the way of analyzing each case on its facts, on its circumstances, to make sure that the relative interests of both the society and the individual are protected?

Mr. CONYERS. That is precisely the description of the reason why the exceptions were made, as I read the Senate Judiciary Committee report. It is for the complex case they create the exceptions to the rule, in which the very balancing that you describe almost to the exact phrase, is what is to be the guiding consideration in determining whether or not the case will be given additional time beyond that normally provided under the Speedy Trial Act of 1974. I don't understand the problem.

Mr. SILBERT. This will be done, sir, within the concept, I believe, of a set time period——

Mr. CONYERS. Right.

Mr. SILBERT [continuing].* Rather than evaluation of the factors that have been carefully enumerated by the Supreme Court, for example, in its recent pronouncements.

Mr. CONYERS. You don't suggest that perhaps there is something unconstitutional about this act?

Mr. SILBERT. No, not at all. I am not alleging in any way its unconstitutionality. I am suggesting, however, that in taking a general overall approach, almost a uniform approach, to the trial of cases, the Congress may, particularly when the Senate subcommittee acknowledges, sir, that it doesn't know the underlying causes for the speedy trial problem—on page 9 of its report, for example, it specifically so states—to then attempt to adopt a blanket-type solution for a problem for which it admits it doesn't know the specific underlying causes, we suggest is not the appropriate approach.

That is why we prefer the individualized approach of the Supreme Court, or at the very minimum, the more flexible approach of rule 50(b), which permits each individual court to adjust and adopt† its program to the requirements and the problems confronting the specific jurisdiction.

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*Brackets in original.

†So in original. Probably should be "adapt."

Mr. CONYERS. Well, I think you are arguing in a circular fashion, because the language describing the bill in the Senate report specifically and clearly allows for the exceptional case; it talks about creating flexibility where it is not the ordinary criminal case, and speaks to those precise interests that you want balanced by the test of determining whether additional time be granted.

Now, if you are challenging the basic fact that we are imposing national uniform standards of time from arrest and indictment and indictment to conviction, then you are just challenging—and you have a perfect right to—the very basis on which the legislation is fashioned. But to say that it works a hardship contrary to what has been anticipated by Supreme Court decisions, when it goes to very great lengths to create the flexibility that you complain is lacking in precisely individual cases is somewhat beyond me.

I mean, I don't see where a conspiracy trial would be endangered in any way under the Speedy Trial Act of 1974. How could it be when, there is provision made for when there are a number of prospective defendants, where the trial is recognized as complex and lengthy and would clearly by agreement with the judge and the prosecutor, and the defense counsel take additional time, it is allowed; they have provided that the time would be excluded.

So where is the harm, contrary to that suggested by the line of Supreme Court decisions?

Mr. SILBERT. I would certainly suggest in view of the fact that although 80 percent of the cases might not be affected, we would have a serious question in a number of important prosecutions as to what the definition of complex litigation is. And complex litigation is not necessarily litigation which has large numbers of defendants.

Mr. CONYERS. But are you suggesting the judge wouldn't have the commonsense to make a determination of what is a complex case? I mean, I think that is a presumption that we ought to give almost every Federal district judge the benefit of. I think they could determine whether a case is going to take more than 60 days to try. After all, they try cases, I presume, as a matter of their profession. I think the U.S. attorneys would certainly be able to make a recommendation where they agree; certainly the defense counsel is not going to be reluctant to make this appeal.

Unless we are questioning the discretion of the judges, or the prosecutors, or the defense counsel, or some combination thereof, it would seem to me that being reasonable men, they would be able to rather easily reach a definition. I wouldn't want to put the burden on the Congress to define with any more specificity what is a complex case. I am quite frankly amazed that they went into the kind of detail that they did. If there is some area not considered, I would certainly like to hear what it is.

"Miscellaneous Amendments," Enclosure to Letter to Representative Conyers from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Oct. 1, 1974, at 1974 House Hearings 756

Page 8, line 10.* After this line insert the following: "(9) Any delay resulting from an emergency situation, such as the illness or absence of the judge from the place of trial, or a vacancy in judicial office."

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*So in original. Probably should refer to line 2.

Letter to Maurice A. Barboza, Counsel, House Judiciary Committee, from Judge Harold R. Tyler, Jr., Oct. 22, 1974, at 1974 House Hearings 762-63

As I see it, the present draft of the Bill ignores one problem which occurs with reasonable frequency in the district courts of the United States. On many occasions, a judge can be involved in a long trial or in a series of long trials which have priority over a newly filed case. In short, the judge, through no fault of the prosecution or the court, may be obliged to be involved in a trial or trials well in excess of the sixty day period after the filing of a new indictment which is assigned to him. As I read S. 754, subparagraph (h) thereof does not include any specific provision for excluding periods of delay for this reason. I recognize that the statute could probably be broadly construed to recognize this problem. On the other hand, I think it would be better if Congress specifically dealt with this question.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 22

A significant provision of the legislation would permit a judge on his own motion, or at the request of the defendant or his counsel or at the request of the attorney for the Government, to grant a continuance which would toll the time limits of the bill. Before deciding the question of whether a continuance should be granted, the court must determine whether the ends of justice served by granting the continuance would outweigh the best interest of the public and the defendant in a speedy trial. The court is required to note in the record the reasons for granting such a continuance. In addition, under the planning process, the court is required to make available to the clerk, for inclusion in a report to the Congress, information concerning the number of and reasons for granting a continuance. This provision serves to provide the Court with the flexibility to extend the time limits of the bill so that they will not operate harshly on the defendant, the government or society.

Motions would be appropriate under this exclusion when the continuation of the proceeding would be made impossible or result in a miscarriage of justice; where the case as a whole is unusual or complex, due to the number of defendants or the nature of the prosecution and it is unreasonable to expect adequate preparation within the time periods; and where the factual determination before a grand jury is complex. In order to prevent abuse of the continuance provision, a continuance will not be granted for general congestion of the court's calendar, or lack of diligent preparation, or failure to obtain available witnesses on the part of the attorney for the Government.

1974 House Committee Report 29

When a case is set down for trial on a particular day or week under the speedy trial provisions, the time scheduled for trial is more than just a target date; it is a strong admonition to all parties to plan their schedules accordingly so that delay based on the unavailability of witnesses, inadequate preparation, and scheduling conflicts due to other commitments will not jeopardize the disposition of the case which could be detrimental to the interests of the defendant, the Government, or society. Section 3161(h)(8)(C) expressly provides that general court congestion, lack of diligent preparation and unavailability of witnesses are not proper grounds for granting a continuance.

1974 House Committee Report 32-33

Section 3161(h)(1)(G) provides for the exclusion of time during which any proceeding concerning the defendant is under advisement. The subcommittee added language which would limit to 30 days the time that each proceeding could be held under actual advisement. The amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:

> Now, I think the language which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term, term "reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted on the matter under advisement is not an unreasonable period in which the district judge could act. I do not think that this would compel the judge to reach on any particular issue an improvident answer merely because he is held to a time limit of 30 days. And yet if such a provision or restriction were written into the Act, it would effectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so could well "sit on a matter" for an indefinite period of time and thus rather effectively defeat the purposes of the bill. [Hearings, p. 340.]*

The Committee concurs with the views of Mr. Barris and also with the Alaska speedy trial rules of court, which provides that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

1974 House Committee Report 33-34

Section 3161(h)(8) provides that no continuance shall be granted for reasons of general court congestion, or lack of diligent preparation, or failure to obtain available witnesses on the part of the attorney for the Government. By approving this provision, the Committee intends to make it clear that the continuance provision should not be invoked for reasons other than those which would meet the ends of justice. The Committee can foresee instances in which institutional delay caused by any of these factors could result in what subsection 3161(h)(8)(B)(i) terms a "miscarriage of justice." However, the nature of the concept of speedy trial is one which recognizes that institutional delays occasioned by poor administration and management can work to the detriment of the accused. Placing a prohibition on the granting of continuances for these reasons serves as an incentive to the courts and the Government to effectively utilize manpower and resources so that defendants may be tried within the time limits provided by the bill.

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*Brackets in original.

Although the Committee cannot foresee any excuses for institutional delay which would justify granting a continuance, it does believe that the lack of diligent preparation or failure to obtain available witnesses on the part of the defendant or his attorney could result in a miscarriage of justice and, therefore, exempts these reasons from prohibiting a defendant or his counsel from seeking a continuance. For example, when a defendant's counsel, either intentionally or by lack of diligence fails to properly prepare his client's case, either he or the defendant might seek a continuance on the ground that forcing the defendant to go to trial on the date scheduled would deny the defendant the benefits of a prepared counsel. The court in this situation would determine whether the defendant participated actively in the delay or whether his counsel alone was responsible for it. If the defendant did not cause the delay, he should not be penalized by being forced to go to trial with an unprepared counsel. In this case, he should be permitted enough time to seek a new counsel and to properly prepare his case for trial. In the event that the defendant actively participated in the delay, then no miscarriage of justice has occurred and the court should deny the defendant's or his counsel's request for a continuance and require the trial to commence on the scheduled date. This is consistent with the well-reasoned view that a defendant should not profit doubly from delay he is responsible for.

Remarks of Representative Conyers, 1974 House Floor Debate, 120 Cong. Rec. 41774

The most important reason for granting a tolling of the time limit, which every judge will have in his power to do, is when there is a complex criminal case.

Some defense attorneys had indicated that some criminal matters are of such complexity that there may be a joinder or severance of defendants, in which case it would be extremely difficult to have the pretrial motions disposed of within 30 days. In those instances we have specifically made complex cases grounds for extension of the running of the time limits on a motion to continue the proceedings, made either by the court, prosecutor, or defense attorney.

But the most important ground for extension of all—and this is also available to the judge—is when the continuation of the proceeding uninterrupted would be impossible or would result in a miscarriage of justice for failure to grant a continuance. Whenever there may be such a miscarriage or other injustice, he has the responsibility, indeed the obligation, to suspend the running of the time limits by motion to continue.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41776-77

Mr. PERKINS. Mr. Chairman, I am interested in knowing how the legislation covers one aspect of a speedy trial. In the event the defendant does not go to trial within 100 days then the reviewing board [planning group] that the gentleman from Maine has described makes a recommendation that the case be dismissed; is that correct?

Mr. COHEN. No; it is not correct. The planning process really is designed to say: What kind of cases have we got? How long are they taking to go to trial? Do we need more judges? Do we need more courtrooms? What do we need to dispose of the cases within 100 days? The planning program then is submitted to the judicial conference and periodic reports made to Congress. But the court will determine whether or not the case will be dismissed. Under this bill, if the 100 days expires there is provision that the court can continue the case on its own motion, if the interests of justice would be served.

Mr. PERKINS. In other words, the gentleman is saying that it is the court that makes the final determination as to whether the case will be dismissed?

Mr. COHEN. That is correct.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777

Mr. WIGGINS. Mr. Chairman, the final question is this:

Are there provisions for extending the rigid time limits? Is it absolutely clear that if such a defendant or his counsel should deliberately stall the proceedings that that period of delay occasioned by such efforts would not be counted in computing time?

Mr. COHEN. The gentleman from California is correct in that regard. Any action taken by defendants to deliberately stall a case, and as I indicated before, in 90 percent or perhaps an even higher percentage of cases, the delay works to the advantage of the defendant, and the gentleman from California, as an outstanding defense counsel, I am sure knows that that is the case.

The purpose, intent, and thrust of this act is to put pressure not only on the court and prosecutor, but on the defense counsel to eliminate delay. My understanding is that any delay that is caused by defense counsel would not be included as part of that. He could not take advantage of deliberately stalling, and then seek a dismissal under that rule. I believe the gentleman from Michigan would agree with that.

Mr. WIGGINS. Does the gentleman from Michigan agree with that observation?

Mr. CONYERS. I thank the gentleman for yielding. I would point out that under 3162 there is a legislative sanction imposing penalties upon attorneys who would act in the way the gentleman from California suggests. So, we are very definitely trying to make certain that the defendant or his counsel will not, through the method that the gentleman suggests—through deliberately stalling—take advantage of the exclusions. The court still has available to it all of its usual procedures for punishment of the counsel, but they have additional sanctions within the legislation itself.

Mr. WIGGINS. I am comforted by the gentleman's answer.

Mr. DENNIS. Mr. Chairman, will the gentleman yield?

Mr. COHEN. I yield to the gentleman from Indiana.

Mr. DENNIS. I thank the gentleman for yielding.

I believe there are provisions in the bill, are there not, which toll or suspend the time limits in the event that the delay is made on the defendant's motion or is otherwise caused by him.

Mr. COHEN. Yes.

Mr. DENNIS. What are those provisions, briefly, and where are they?

Mr. COHEN. I will direct the gentleman's attention to pages 5, 6, 7, and 8 of this particular bill which contain a series of situations which the court would exclude the time period, including "any period of delay resulting from the absence or unavailability of the defendant."

On page 8, (8)(A)——

> Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel. . . .[*]

I assume that would take into account a request by defense counsel to file a motion requesting continuances. The court would consider in tolling that time page 8, subsection (8)(A).

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777

Mr. COHEN. If I might respond to the gentleman now—I will when he offers his amendment [to lengthen the time limits]—we have provision for the complex case. The Watergate trials might be an example of it, for, clearly, that case would not be tried and cleared within the 90- or 100-day period of time. There is provision to exclude the operation of this 100-day limitation in such cases of a complex nature.

In addition to that, I think, realistically speaking, it will take into account the exclusion of the time period of this particular act to file other pretrial motions by defense counsel.

I would suggest to the gentleman from Indiana that realistically speaking there is not a defense counsel who is worth his salt who would not file every available motion, motions for discovery, and other pretrial motions in order to properly represent his client. Those periods would be excluded. So for all practical purposes we are not talking about simply 100 days. That is a minimum. In all cases I think it would go much longer because of the discovery motions, pretrial motions, and the interlocutory motions, and so on. There are some exceptional circumstances which will extend that.

In all likelihood it would exceed the 100-day period. In any event, if we have such a defense counsel as the gentleman talks about, one who could not get ready for trial in 3 months, section 8(A) provides an exemption for that, so that the court would continue to allow him more time, or any cases in court, and the court would take into account whether a continuance would serve the ends of justice. Clearly, I think it would consider that if there is a conflicting schedule.

Mr. DENNIS. I suppose that is discretionary with the court?

Mr. COHEN. It is.

Mr. DENNIS. So it is still somewhat of a bind for a man who is trying to persuade some judge, and some judges think what is going on in their courts is more important that what is going on in heaven. It is not always easy to get a motion granted.

Mr. COHEN. The court in all likelihood would accede to the legitimate request for a continuance, because it would be able to take into account legitimate reasons as opposed to someone engaged in dilatory tactics. That is the reason for giving that discretion to the court.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41778

[Mr. BURLISON of Missouri.] Now, as I understand the legislation, dilatory tactics on the part of defense counsel results in tolling the statutory time period set out. I am not so sure that that really changes much from what the law is now. My question, is there anything in this legislation to put any restrictions on dilatory tactics of defense counsel?

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[*] Ellipsis in original.

Mr. COHEN. Mr. Chairman, I appreciate the inquiry of the gentleman, I refer the gentleman to page 13 of the bill whereby a court can impose a fine on counsel who engage in dilatory tactics not to exceed $250. They can also refer them to the ethics committee of the Bar Association, which is designed to discourage that.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41780-81

Mr. ALEXANDER. Mr. Chairman, I thank the gentleman for yielding. I take this time to ask the gentleman a question.

My concern is based upon the provisions of the bill that require that an information or indictment must be filed within 30 days after arrest or that charges against the defendant may not later be brought, and the further provision that the trial must be held within 60 days after arraignment or indictment or the defendant must be released.

I am familiar with Federal courts where there is only one judge, and extraordinary time requirements ensue as a result of unusual cases, like the bakery conspiracy cases in 1960's, or a protracted patent or copyright case that might require weeks for trial, or, as we have seen recently, the Dakota trials of the Indian insurrection, or a Watergate type trial.

My question is, are there exceptions to these time limits which take into consideration the extraordinary time required for litigation of cases that require protracted trials in one-judge courts?

Mr. CONYERS. The gentleman raises a very pertinent point, and this legislation was amended in subcommittee by the gentleman from Maine (Mr. COHEN) to recognize the special problems that exist in rural districts. For those jurisdictions where grand juries sit infrequently because of the small number of criminal case filings as the case may be in rural areas, we added a provision that would extend the time period for filing an indictment up to 30 days where no grand jury has been in session following the arrest of a defendant to the running of the time limit between indictment and trial.* Additionally, a provision was included to allow the court to schedule trial at any place within the judicial district to insure that the defendant receives a speedy trial in large geographic districts in which judges are required to travel from division to division.

Mr. ALEXANDER. I thank the gentleman, but I am still concerned that additional consideration of this point is needed.

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41791

Representative Cohen made the following remarks in opposing an amendment that would have added thirty days to the arrest-to-indictment time limit and thirty days to the arraignment-to-trial limit:

The gentleman from Indiana wants 60 more days in order to prepare for trial. Realistically speaking, that 60 days will add to the time inevitably to be added because of pretrial motions, pretrial discovery, so it is 60 days on top of those days, which is extending it 120 days, rather than 60. We are trying to put some discipline into our system. When an attorney comes before the court and says that he has a legitimate case, another case or two that are up for trial and that in justice his client deserves to be represented and he asks for a continuance, I cannot conceive in a case like that a court would say that a defendant is being adequately represented and deny the motion.

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*So in original. The time limit under discussion was the limit between arrest and indictment.

What we are trying to do is eliminate that situation in which counsel engages in dilatory tactics. I can say from my own experience that defense counsel will delay and delay, knowing the prosecutors have 80 or 90 cases to try, and the only way to combat that is to tell defense counsel to either plead them, or try them, but no more stalling.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41792-93

Mr. WIGGINS. Mr. Chairman, I move to strike the last word.

Mr. Chairman, I ask the attention of the gentleman from Michigan (Mr. CONYERS) and the gentleman from Maine (Mr. COHEN).

Under section 3161(h)(8) the time limits may be extended by continuing the case if the ends of justice would be served thereby.

Mr. CONYERS. That is correct.

Mr. WIGGINS. Under this section, however, general court congestion may not be the basis for such continuance.

Assume a one-judge district court is engaged in a protracted, complex criminal trial; assume further that there are noncomplex criminal cases trailing the difficult one. Under those unusual circumstances, may the court continue the noncomplex cases in the interest of justice, under section 3161(h)(8), and that the single complex case would not be considered general court congestion so as to prohibit that action?

Mr. CONYERS. If I understand the gentleman's hypothetical, we are talking about all criminal matters, are we not?

Mr. WIGGINS. Yes.

Mr. CONYERS. It would seem to me that whether or not the less complex matter would be suspended so that a more complex matter could move forward would depend upon whether an ends of justice continuance could be granted on the grounds that a miscarriage of justice might possibly result? Is that the thrust of the hypothetical question?

Mr. WIGGINS. I am trying to pose the problem of a district court which is involved in protracted litigation in a complex criminal case and trailing that case are several relatively routine cases. The question is: What is the court going to do with these trailing cases which must be brought to trial within a certain period of time?

My question is whether or not, under those unusual circumstances, the court might invoke the provision of 3161(h)(8) to continue the noncomplex cases in the interest of justice, if in fact justice would be served thereby, and would not be prohibited from doing so on the basis of general court congestion.

It is my contention there is no general court congestion under those circumstances but, rather, an unusual situation occasioned by a single protracted trial. The congestion is not "general" in nature.

Mr. COHEN. Mr. Chairman, will the gentleman yield?

Mr. WIGGINS. I yield to the gentleman from Maine.

Mr. COHEN. I thank the gentleman for yielding, and I would point out that if there is a complex case and a series of minor cases to be tried following it, if the court cannot secure the attendance and the help of additional judges or additional courtroom facilities or staff, I think the gentleman is right, he would be able to continue it under this section in the interest of justice, as long as we make clear this is an exceptional circumstance and not make a loophole to continue it under the escape provided here.

With exceptional cases, I think the gentleman is correct. In the interest of justice it would not be a matter of court congestion, but an exceptional, complex case which ought to be provided for under this section.

Mr. WIGGINS. That is my understanding, as well. Normally, such a problem is resolved by the assignment of additional personnel and judges, but it may not be possible to reassign judicial manpower in time to meet the time limitations of the bill. It is also possible to invoke the judicial emergency section, but that is a complicated procedure. It is my belief that the court has the authority to grant a continuance in the interest of justice under (h)(8) in order to obtain sufficient time to get personnel to handle the trailing cases.

Mr. CONYERS. Mr. Chairman, will the gentleman yield?

Mr. WIGGINS. Yes, I yield to the gentleman.

Mr. CONYERS. Mr. Chairman, I would like to concur in the thrust of this colloquy.

However, it must be clear that no court will be permitted to grant an ends of justice continuance based upon the reasons cited by the gentleman from California (Mr. WIGGINS) unless it first attempts to reassign the less complex matter to another judge, or the judicial council of the circuit is asked and refuses to provide a visiting judge to try the case.

As the gentleman knows, the purpose of H.R. 17409 is to undertake a comprehensive planning process for the purpose of increasing the management capabilities of the courts to deal with these kinds of occurrences. The courts must be prepared in advance for such foreseeable conflicts caused by the trial of long and complicated cases. It is my view that a judge who knows that a complicated case has been assigned to him has adequate opportunity, months in advance of the trial date, to make arrangements for the disposition of other criminal matters on his docket.

Since the trial judge is required by the bill to enter in the record the reasons for granting an ends of justice continuance, the circumstances which cause him to do so must meet the test laid down by this provision to the letter. The consequences of not doing so would provide the basis for the reversal of a denial to dismiss a case on the grounds that the judge improperly excluded time for a continuance in computing whether the speedy trial time limits have been breached.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41788-89

The floor amendment to this paragraph was one of a series of amendments described as "technical and conforming" amendments, which were offered by Representative Cohen and considered and adopted en bloc. There was no explanation or discussion of the amendment to this paragraph.

Materials from the History of the 1979 Amendments

Opening Statement of Senator Joseph R. Biden, Jr., at Second Day of Hearings, 1979 Senate Hearings 72

[B]efore turning to the witnesses, I would like to frame what I believe to be the ultimate questions for the committee and, therefore, our witnesses today.

Phil Heymann, who appeared on behalf of the Justice Department, argues that the best solution to the speedy trial is to lengthen the time limits and narrowly construe the exclusions. Proponents of the act argue that the best approach is to leave the time limits intact and more liberally construe the exclusions as the second circuit has been doing.

Today we will hear from Judge Ward who wrote the second circuit guidelines. I understand Judge Ward will use the case that Phil Heymann used in his testimony to illustrate that a flexible interpretation of the exclusions and the present time limits will achieve the same results as the Department of Justice's longer time limits and narrow construction of the exclusion.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 50

Time is needed to collect and review investigative reports and other evidence. In some of the less urban states, FBI and other investigative agents are housed all around the district. Collecting reports held by these agents can take many days. Once these reports are collected and reviewed, time is needed for investigators to follow out leads, for prosecutors to conduct a thorough exploration of the case in the grand jury, and for chemists and other experts to complete their scientific analyses. The OIAJ study cited problems in obtaining laboratory reports analyzing such things as handwriting samples, fingerprints, or other physical evidence as a major source of delay. These laboratory reports often routinely take four to six weeks to get back.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 54

Scheduling conflicts for prosecutors are inevitable, and judges, faced with the strict time limits, have refused to grant a continuance where the Assistant assigned the case is in trial before another judge. This has forced the government to reassign the prosecution of the case to another Assistant. This is done even though the new Assistant assigned to the case, unlike the first Assistant has no familiarity with or knowledge of the case. The result is an unjustified duplication of work and often a lack of preparation of the reassigned case.

Testimony of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 35, 41-42

Time is needed . . . to collect and review investigative reports and other evidence. In some of the nonurban States, FBI and other investigative agents are housed all around the district. We have a memo from our U.S. attorney in the Southern District of Indiana that I would like to submit for the record, Mr. Chairman, Virginia McCarty. She describes how the FBI agents and the DEA agents are scattered around the district and the fact that they can only get matters typed, frequently, by mailing them in to Indianapolis, taking much time simply in transportation.

Senator BIDEN. It will be included in the record.

[Text of memorandum omitted.]

Mr. HEYMANN. Collecting reports held by these agents can take days. Once the reports are collected they must be reviewed. All of this frequently has to be done after arrest because we cannot delay arrest. The arrest takes place when you see somebody robbing a bank or selling drugs.

Time is needed for investigators to follow out leads, for prosecutors to present the case to the grand jury for chemists and other scientific experts, often in Washington or scattered around the country, to process the scientific information, and for fingerprints to be sent in for review.* While each of those cases has a 30-day deadline on it, each of these places is processing many other cases at the same time.

When Virginia McCarty from Indiana, or her FBI agent, sends in for scientific tests or for FBI prints, they do not go on the top of the pile. They cannot go to the top of the pile because Bob Fiske from New York and Billy Hunter from California are doing the same thing at the same time.

Senator BIDEN. Now, does not the act presently say that if you need more you come and tell us what you need? It sounds like you are talking about administrative problems—that an FBI agent cannot get a typewriter: you cannot get the fingerprints checked out.

The act says that if you need more, come tell us what you need.

Mr. HEYMANN. Let me tell you about one we would like more of, Senator Biden. The Congress passed last year the Financial Privacy Act. I do not want a change in this, but let me indicate what it does to a 30-day time limit.

It gives an absolute right to the subject of the financial records request which we use frequently in our cases, to have a 10-day delay before the financial records are turned over—if they are turned over. If those financial records lead us to others, which frequently happens, we have automatically 20 days. If we want to do that twice, we cannot satisfy the act.

Senator BIDEN. Sure you can. All you have to do is make that known to the court. There is a provision in the act right now, the court can extend it without any great, major delay. I do not think that your argument is particularly cogent.

Prepared Statement of John J. Cleary, 1979 Senate Hearings 99

The statutory language should be expressly clarified to ensure that the defense has an adequate opportunity to prepare which would include proper investigation, research and access to the court's process to ensure adequate discovery and access to witnesses. The principles underlying the defense's inherent right to prepare [*Powell* v. *Alabama*, 287 U.S. 45 (1932)] should be more clearly stated in this statute.†

Testimony of Judge Robert Peckham, 1979 Senate Hearings 132-33

I think in light of the prior discussion with defense counsel this morning that it might be very helpful if in (h)(8) there was added another factor, and that factor would have to do with the problems of counsel with prior engagements having the need for more time to prepare.

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*Punctuation so in original.

†Brackets in original.

I was very impressed with the language in the second circuit guidelines in that regard. I think the inclusion of such a factor would signal to any judges who might be taking a fairly strict view that Congress intended that those factors should be taken into account when considering (h)(8) exclusions.

There is a certain majesty—perhaps I am naively impressed—there is a certain majesty about the language "Ends of justice shall outweigh the public and defendant's interest in a speedy trial." But on closer inspection I'm not sure that the scope of the provision is all that clear.

And, as I hear, this morning the constant reference that the act really is very workable because almost any problem can be handled through this (h)(8) mechanism, I do want to point out that I think many judges are uncertain as to the latitude that they have, the parameters of the discretion that the Congress is setting forth here.

There is another matter which may in fact not be an ambiguity. That is the reference in (h)(8)(C) to general congestion in the court not being a ground for invoking an (h)(8) continuance.

As you know, almost all districts are on the individual assignment system. Each judge schedules his own cases. I take it that that means that if in my little example earlier of the judge setting the case, if within that 60-day period he had already set very deeply, perhaps had committed himself to the beginning of a 3-week trial——

Senator **Biden**. By set deep, do you mean far in advance?

Judge **Peckham**. No. Several cases at the beginning of each trial period, that is, the beginning of each. I am sorry, when I say set deep I mean three or four on a particular day. You can't just set one case at a time. It settles; you are sitting there with nothing to do. So it becomes somewhat of an art in setting that you don't overset, because if you have set too many, then you have a trailing problem. None of the lawyers will take your dates seriously.

But with respect to the language of general congestion, let me quickly make this point. If the judge perceives that he will not reach the criminal case during the 60 days because of prior settings, then I take it that language about congestion means that he cannot use (h)(8) to extend the time for that case beyond 60 days. That could mean that he would have to bump a civil case and make way for the criminal cases. In other words, he couldn't continue the case beyond the limits under (h)(8) because there was congestion in his calendar.

Now my recollection is that both guidelines are silent on the meaning of "general congestion."

I note also that there has been some comment that it could be argued that the situation of one judge's congestion is not the congestion that is referred to by the statute, that only general congestion of the entire court is referred to. But I would be concerned about taking that view because, with the individual assignment system, and the act's separate provisions for judicial emergencies, it seems to me that the congestion of the individual judge's calendar must be what the Congress intended in (h)(8).

If a different interpretation was intended, I think that, too, should be clarified.

Letter to Senator Birch Bayh from Judge Prentice H. Marshall, May 10, 1979, at 1979 Senate Hearings 442

Other than its provision for excluding time in the interests of justice, the Act does not address the problems of engaged privately-retained counsel. Here I do not have in mind the lawyer who accepts more engagements than he or she reasonably can be expected to discharge. Rather I have in mind the situation which has confronted me within the last week: A seventeen-defendant conspiracy case in which the defendants are business persons of heretofore good repute charged with corrupting state governmental officials. Each defendant will probably be separately represented and should be. The case will take ten to twelve weeks to try. The lawyers representing the defendants are men and women of outstanding reputations and the abilities needed to defend the charge such as this one. Now normally there would be no difficulty. We would set the case for trial in July or August and be about our business. The difficulty lies in the fact that one of my colleagues has pending before him a multi-defendant criminal antitrust case in which several of the lawyers representing defendants before me are scheduled to proceed to trial there in the late summer in a case which it is predicted will take twelve to sixteen weeks to try.

I could take the position that the lawyers who appeared before me cannot, in light of their prior commitment in the antitrust case, accept the present engagement. But I am apprehensive in doing that because of the generally accepted attitude that an accused has a constitutional right to counsel of his or her choice. I realize that the counsel of choice doctrine has not been closely examined by the Supreme Court or other high courts of review. Nevertheless, one is hesitant to brush that notion aside in a case which will take as long to try as the one I am confronting.

Therefore, I suggest that thoughtful consideration be given to amending the Act to accommodate or reject such conflicting engagements. It may well be that the Congress in its judgment will conclude that conflicting engagements of counsel are not adequate grounds to exclude time under the Act. If that be so, a meaningful constitutional debate will occur in the committees of Congress and on the floors of both houses, so that the issue is confronted. If the Congress concludes that conflicting engagements should result in excluded time, that will be specifically spelled out in the Act.

1979 Senate Committee Report 19-20

Data gathered on the use of "ends of justice" continuances, which, as noted above, this Committee considered "the heart of the speedy trial scheme," is particularly instructive. The Administrative Office reported that, during the last full court year, such continuances comprised 16.2 percent of all incidents of delay. Again, the findings of the Department are in accord:

> * * * On a national scale, this category accounts for approximately one-third of all incidents of excluded processing time. Yet, in one sample district it accounted for two-thirds of excluded incidents and, in another sample district, almost none.*

For that same year, the General Accounting Office found that only 5.6 percent of the defendants whose cases were terminated were granted a continuance. In the eight districts it surveyed closely, which included four of the country's busiest criminal jurisdictions, defendants were granted continuances in only 1.5 percent of the cases. In two of those districts, the number of defendants granted continuances was less than 1 percent of the total.

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*Ellipsis in original.

Various explanations are for [*sic*] apparent underutilization of the Act's "safety-value" exclusions. The Department study provides one:

> While continuation of inconsistencies of this sort after the Act becomes fully effective will make compliance in some districts extremely difficult, and thus increase the likelihood of dismissals, it seems likely that more uniform and more realistic applications of the exclusions will occur. As one trial judge reassuringly expressed it during an OIAJ interview, greater use of the excludable time provisions will be made "when it counts", i.e., when the consequences for non-compliance is dismissal.

Other explanations are much less reassuring. The staff of the Fordham Law Review undertook a detailed survey of experience under the Act in three adjoining metropolitan districts. They found that,

> (i)n spite of the flexible application of section 3161(h)(8) intended by Congress, approximately half of the judges interviewed in the three districts construed the provision narrowly. The explanations for this reticence to grant excludable continuances ranged from hostility toward the Act to unfamiliarity with its provisions. One judge, whose antipathy was obvious, reasoned that "the best way to get rid of a bad law is to enforce it strictly." Several judges noted that granting continuances increased their administrative burden because they only "rented time" postponed trials must be squeezed into time slots that may already be overcrowded. Others, perhaps unaware of the flexibility intended by the drafters, feared criticism that they would subvert the congressional mandate of speed if they did not try every case within sixty days.

Whether isolated or more widespread, such interpretations are inconsistent with congressional intent as to the policy objectives of the Act. As the House Committee stated in its report:

> The Committee believes that both delay and haste in the processing of criminal cases must be avoided; neither of these tactics inures to the benefit of the defendant, the Government, the courts nor society. The word speedy does not, in the Committee's view, denote assembly-line justice, but efficiency in the processing of cases which is commensurate with due process.

Neither hostility toward the Act nor fear of the consequences is a justifiable basis for interpretation which is so strict as to deny the spirit of it as well as its letter in application. The Committee does find, however, that some provisions of the Act, particularly with respect to excludable delays, deserve legislative clarification consistent with recommendations of the Department, the Judicial Conference and the defense bar. Moreover, existing legislative history with respect to the meaning of the exclusionary provisions and the probable frequency of their application may be unduly harsh, as a result of an overabundance of caution on the Judiciary Committees' part in reaction to contemporary expressions of hostility toward the Act.

Accordingly, the Committee amendment makes changes in several excludable time and continuance provisions to meet legitimate concerns; these changes, and their intended meaning, are expressed and explained in the next section.

The Committee must stress, at this juncture, that no amendment short of repeal and no amount of interpretive language could conceivably meet every objection and solve every problem arising from the Act's application in a practical setting. To attempt to do so would so constrict the Act as to hamstring its inherent flexibility and defeat its principal aims as a consequence. While the Administrative Office has demonstrated diligence and good faith in its efforts to guide the districts toward a reasonable application of the Act in practice, the Committee finds that, too often, the Administrative Office has erred on the side of caution. The Second Circuit has interpreted the Act and its legislative history in a creative manner which preserves its objectives and specifically addresses most of the problems which have hindered its smooth implementation, as Judge Ward's example, supra, demonstrates. After careful reading, the Committee is of the opinion that the Second Circuit guidelines are worthy of consideration by all the districts as a model for future implementation, consistent with presently-contemplated changes. The Committee invites every circuit council and district chief judge to give them the closest attention possible.

1979 Senate Committee Report 23

The Justice Department also contends that the final arrest-indictment time limits will prejudice the ability of the Government to investigate the charges fully before the time runs. . . .

In this case the Department's concern has been carefully documented and legislative relief is appropriate. The Department's study found the unavailability of investigative reports to be one of the three most significant causes of delay in the nine districts it surveyed, regardless of whether their compliance levels were low or high with the Act's time limits. The General Accounting Office found the same situation existed in the districts it studied, although it found in some cases that requests for priority processing had not been made. Although § 3161(h)(8)(B)(iii) can arguably be extended to cover reasonable periods of delay during which reports from investigative agencies and evidentiary analyses from laboratories are completed and the Second Circuit has so interpreted it, the Committee recognizes that this question is a serious one.

Accordingly, the Committee's amendment clarifies that section's "ends of justice" continuance provisions to permit a court, in a case where arrest precedes indictment, to grant a continuance if it finds "that it is unreasonable to expect return and filing of the indictment" within the time limits, less other excludable delays.

1979 Senate Committee Report 25-26

A second concern is more serious: adequate time for the consideration of plea bargains. None of the speedy trial objectives sought to be advanced by the Act is served if an innocent defendant, faced with little time to prepare his defense and a Government prepared for trial, accedes to a guilty plea to reduced charges rather than running the risk of a worse fate at trial. The same is true if a United States Attorney with a significant backlog of criminal cases decides to resort to plea-bargaining serious offenses. The most that current data shows is that cases disposed of by plea have increased slightly in the three years the Act has been in effect over the year previous to its enactment but, again, the dismissal sanction has yet to take effect. Whether the excludable delay provisions include time spent by the court in considering a plea bargain proposed to be entered into by the parties is once again, a matter of interpretation. In its recently-promulgated guidelines, the Second Circuit lists "a defendant's cooperation" as one of the circumstances in which the "ends of justice" almost always outweigh the speedy trial interests * * * (whether viewed as a circumstance 'likely to make a continuation of (the) proceeding impossible' under (§ 3161)(h)(8)(B)(i) or a separate factor."* The attendant comment says:

> It is evident that a plea agreement or an agreement to terminate the prosecution of a cooperating defendant can often not be made until well after the statutory periods have run. Consequently, an (h)(8) continuance would be most appropriate.

If Federal prosecutorial policies are changing in emphasis to reserve for trial more serious offenders, it is obviously not in the public interest to permit those who have engaged in less serious, but nonetheless proscribed, criminal conduct to "take under advisement" a negotiated plea agreement and then move for dismissal once the time to trial has expired. To the same degree public confidence in equal justice would be eroded from the incarceration of an innocent person forced to plead guilty, due to an inability to prepare his or her defense on time. Either would surely constitute a "miscarriage of justice," and, as the Second Circuit makes plain, no such result was intended. As a general matter the committee is reluctant to automatically exclude plea bargaining *per se* because the difficulty of measuring the beginning on a bonafide bargaining [*sic*] but prefers the case-by-case approach of second circuit under existing language. However, the Committee amendment would exclude automatically from the sixty-day period delay resulting from consideration by the court of a proposed plea agreement entered into by the defendant and the Government.

The most serious concern about the arraignment to trial period raised by proponents of change involves the ability of the defendant to obtain and maintain counsel of his choice and prepare effectively for trial. Not surprisingly, given palpable judicial unwillingness to interpret the Act's exclusions flexibly to date, the absence of a dismissal sanction to serve as an incentive and a Government which may be prepared to try its case when the indictment is returned, many defense lawyers have characterized the Act as the "Speedy Conviction Act." Theoretically, the defense has a maximum of one hundred days to prepare for trial, less appropriate excludable delays; however, since fewer than four in ten cases commence with arrest, most defendants would have seventy net days to prepare. Moreover, preparation time may be further limited to sixty net days, or less. The ten-day indictment to arraignment period is often eliminated by holding arraignment on the day of indictment or, when arrest follows indictment, on the date of the first appearance. At that point, the clock starts to run. If a defendant is not represented by counsel at that point, part of the preparation time must be consumed searching for representation. Given the fact that a United States Attorney can control the switch on the clock to the extent that the seventy-day maximum is begun upon indictment, the burden of preparation does not always fall as heavily on the Government.

If courts, feeling compelled to schedule trials immediately, are loathe to grant "ends of justice" continuances to permit adequate preparation time—and the Committee finds considerable evidence that many are—and construe automatically-excludable delays with too much inflexibility, the defendant and his counsel may shoulder an unintended and unwarranted share of the speedy trial burden. As the comment from the House Judiciary Committee's 1974 report makes clear, the expedients of speed and efficiency were not to supersede the elements of due process; "* * * (a) scheduled trial date should never become such an overarching end that it results in the erosion of the defendant's right to a fair trial."*

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*Ellipsis and placement of parentheses and quotation marks in original.

The Committee believes that the defendant's ability to retain counsel of his choice and within his means, to enjoy continuity of counsel where possible and to have diligent counsel prepared to put on his or her defense are essential and must be encouraged where to do so would not frustrate the public's interest in speedy trials and would serve the ends of justice. While it believes that the Act as written is flexible enough to permit the realization of these objectives, its legislative history placed undue emphasis on case complexity and failed to foretell the types of occurrences for which defendants should not be penalized, such as good-faith scheduling conflicts and illness. For these reasons, the Committee amendment clarifies reasonable delay for pretrial motions preparation which may automatically be excluded and sharpens the variety of factors courts may consider in deciding whether to grant "ends of justice" continuances, includin the uniqueness or complexity of the case, obtaining and maintaining continuity of counsel and reasonable preparation time.

1979 Senate Committee Report 28-29

In conjunction with its recommendation to enlarge the time limits of the Act while giving the defense not less than thirty days to prepare for trial, the Judicial Conference has recommended in the past that the Act be amended further to permit the defendant to waive the thirty-day minimum. While the Committee has received no formal legislative recommendation to permit waiver by the defendant of any part of the Act, it has found that some judges feel that the Act may be waived by a defendant currently.

The sole reference to waiver in the Act appears in § 3162(a)(2), which states:

> * * * Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.†

The committee wishes to state, in the strongest possible terms, that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his statutorily-conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial.

Several arguments based on constitutional grounds have been advanced to justify the use of waiver:

(1) Waiver of the speedy trial guarantees established by the Act is properly inferred from the defendant's ability to waive the Sixth Amendment right to speedy trial. As has already been stated, the Act seeks to protect and promote speedy trial interests that go beyond the rights of the defendant; although the Sixth Amendment recognizes a societal interest in prompt dispositions, it primarily safeguards the defendant's speedy trial right—which may or may not be in accord with society's. Because of the Act's

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*Ellipsis in original.

†Ellipsis in original.

emphasis on that societal right, a defendant ought not to be permitted to waive rights that are not his or hers alone to relinquish.

(2) A construction of waiver is necessary to preserve the constitutionality of the Act. Specifically, it is asserted that the excludable time provisions do not allow delay in many circumstances where denial of a continuance would deprive the defendant of his or her rights to assistance and choice of counsel, as well as due process of law. If the defendant cannot in those instances free himself from the statutory constraints through the expedient of waiver, the argument proceeds, the Act is to that extent unconstitutional. The Committee contends that any conclusions that the Act does not provide sufficient latitude to permit delay in situations where a defendant's recognized Sixth Amendment right is jeopardized thereby—effective assistance of counsel, including the right to prepare an adequate defense and reasonable preparation time; choice of counsel; and fundamental due process is based on reading the Act much too narrowly. The Second Circuit guidelines in construing both the automatically-excludable delay and the "ends of justice" continuance provisions, make ample room for accommodation of circumstances where strict enforcement of the Act's time limits might prejudice acknowledged Sixth Amendment speedy trial rights which accrue to the defendant. Nonetheless, the Committee amendment further clarifies applicable provisions in both the delay-exclusion and continuance provisions to remove any doubt.

1979 Senate Committee Report 31

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:

> . . . .
>
> (5) clarifying the grounds for "ends of justice" continuances to permit reasonable delay where, due to the nature of the case or attendant circumstances, it is unreasonable to expect an indictment to be returned or either party to be fully prepared for pretrial proceedings or trial within the time limits and, in routine cases, to protect the defendant's ability to obtain counsel of choice and to protect the ability of both parties to prepare fully from unforeseen circumstances . . . .

1979 Senate Committee Report 32

[T]he Committee wishes to stress that this minimum-preparation time guarantee [of section 3161(c)(2)] is not to be construed to permit the defendant to delay unduly the trial date, especially where permissible excludable delay is found. If, for example, counsel for the defendant moves for an "end of justice" continuance under section 3161(h)(8) to allow him or her additional time to prepare for trial, the court should scrutinize closely his or her good-faith efforts to prepare inside the time fixed for trial, taking into account other excludable delays. Again, the court should take great care to balance the defendant's and society's speedy trial rights against the "ends of justice" to be served by granting such a motion.

1979 Senate Committee Report 33-34

The Committee's recommended changes in the computation of excludable delays and pretrial motions practice bear some explanation. First, the language in subparagraph (F) of subsection (h)(1), the automatically excludable delay provisions, must be read together with the proposed change in clause (ii) of subsection (h)(8)(B) involving "preparation" for "pretrial proceedings". Although some witnesses contended that all time consumed by motions practice, from preparation through their disposition, should be excluded, the Committee finds that approach unreasonable. This is primarily because, in routine cases, preparation time should not be excluded where the questions of law are not novel and the issues of fact simple. However, the Committee would permit through its amendments to subsection (h)(8)(B) reasonable preparation time for pretrial motions in cases presenting novel questions of law or complex facts. We suggest caution by courts in granting "ends of justice" continuances pursuant to this section, primarily because it will be quite difficult to determine a point at which preparation actually begins.

This provision and the change the committee amendment makes with respect to the automatic exclusions for pretrial motions in (h)(1)(F) is an appropriate subject for circuit guidelines, pursuant to the Committee's addition of a new subsection (f) to section 3166. Not only should such guidelines instruct courts on how to compute the starting date of preparation for complex pretrial motions, but such guidelines should also set uniform standards for motion practice. Many courts by local rule have either adopted an omnibus pretrial motions procedure, which requires consolidation of all such motions soon after arraignment, or they require the filing of pretrial motions within a specified number of days (often 10) after arraignment, although they need not be consolidated. The Committee expresses no preference but recognizes that, if basic standards for prompt consideration of pretrial motions are not developed, this provision could become a loophole which could undermine the whole Act.

1979 Senate Committee Report 34-35

Section 5 of the Committee amendment clarifies the list of factors that the court should consider when granting an "ends of justice" continuance under section 3161(h)(8).

Subsection (a) amends clause (ii) of existing section 3161(h)(8)(B) to address, in part, the preparation time problem regard [*sic*] pretrial motions, discussed above. In addition, it makes it clear that, in unusual or complex cases, the court, by utilizing the "ends of justice" balancing test, can grant a continuance to either party where circumstances warrant it, such as extensive discovery based on complex transactions.

Subsection (b) deals with a very specific problem presented to the Committee by the Department of Justice. When the Congress considered the Act in 1974, it specifically created flexibility in subsection 3161(b) for small and rural districts, where grand juries are not in continuous session, by providing an additional 30 days when arrest occurs when the grand jury is not in session, during the 30 day period. The amendment made here is designed to clarify the authority of the court, pursuant to the general "ends of justice" balancing test, to grant a continuance in a circumstance such as might occur in a rural jurisdiction where a regularly-convened grand jury is to expire shortly after an arrest is made. This provision assumes that the Department feels constrained to arrest the defendant, e.g., for fear of flight, yet cannot be prepared to present the case to the grand jury within the time before it is due to expire.

The amendment in subsection (c) meets the defense bar's major concern that, in some circumstances, there will be inadequate time to prepare within 70 days from indictment, as well as the Government's concern that, in some cases, the 30 day period from arrest to indictment is too short for adequate investigation. There are three significant parts to this provision:

First, defendants are specifically afforded a reasonable time to obtain counsel. A continuance would be available explicitly to toll the time limit for a reasonable period during which the defendant seeks to obtain legal representation of his choice. Under existing law, the defendant may be faced with an impending trial date without counsel and, instead of being able to spend his time working on the defense, he must spend his time trying to find representation. This amendment would, if the court finds that the "ends of justice" require it, "stop the clock," for a reasonable time, until the defendant obtains counsel.

Second, this amendment would provide a basis for a continuance, for either the Government or the defendant, when failure to do so would unreasonably deny continuity of counsel. This meets the concern over scheduling conflicts caused by defense counsel's and the United States Attorneys' good faith, already scheduled commitments or other unavoidable problems such as emergency, illness, long-planned vacation or other circumstances which would otherwise require a disruptive change of counsel, in order to meet the time limits.

Third, and most important, the Committee amendment provides the court a basis for a continuance when, after due diligence on the part of counsel for either party, there is simply not enough time to effectively prepare for trial of a case which is neither unusual nor complex, within the meaning of new clause (ii), *supra.* The Committee intends that the Government would bear a heavy burden under this provision, in cases started by indictment, when it has been preparing a case for a substantial period of time prior to seeking and obtaining return of the indictment. In cases initiated by arrest, however, granting a motion for continuance under this provision should be easier.

Testimony of U.S. Attorney Robert Fiske on Behalf of the Department of Justice, 1979 House Hearings*

In terms of the impact on our offices, there are two things that I think the Senate bill and the second circuit guidelines do that are very important. One, they deal with the arrest to indictment stage which Phil Heymann alluded to just a moment ago by making it very clear that it is appropriate to give an (h)(8) continuance in cases where by reason of the nature of the investigation it simply isn't possible to return an indictment within 60 days of an arrest.

One of the most common problems, and one of the most common concerns is the situation where you have, where you are quite sure is a syndicate, a network of criminals working together. Take a narcotic case, for example, and you may have to arrest one of the defendants for valid law enforcement reasons. He may be able to flee or something else. That immediately starts the time period running for an indictment of that particular defendant. Under ordinary circumstances we would much rather not indict that defendant until we completed the investigation of the entire syndicate and can indict everyone at once, because once you indict the first defendant, the time starts running for his trial and you may end up having to go to trial against that particular individual and give up an informant and give up witnesses before you are ready to go forward with the others.

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*Excerpted from galley proof.

So, this is the most compelling case really for a continuance that would allow the indictment period to be extended until after the investigation was complete. That concept is written into the second circuit guidelines, and it is also in the Senate bill, and it is of great value to law enforcement.

1979 House Committee Report 10

The committee adopts, without change, the Senate amendments to the provisions of Section 3161(h) of the act relating to exclusions and "ends of justice" continuances.

1979 House Committee Report 12

Section 5 amends in three respects the language of section 3161(h)(8) providing for "ends of justice" continuances. These changes would—

(a) Revise language relating to the grant of continuances based on the complexity or unusual nature of a case to clarify that such continuances can be granted on the basis of delays in preparation of the case in all phases of the cases, including, for example, in the preparation of complex pretrial motions;

(b) Authorize an "ends of justice" continuance to take into account arrest to indictment delay which occurs when a defendant is arrested in the final days of a grand jury session, indictment cannot reasonably be obtained before the end of the session, and another grand jury will not be convened within the 30-day requirement of section 3161(b). In the view of the Justice Department, this amendment is needed in rural and sparsely populated districts, where grand juries are not in continuous session; and

(c) Add a new subsection to section 3161(h)(8) to permit "ends of justice" continuances, in cases other than "unusual or complex" cases covered by section 3161(h)(8)(B)(ii), when such a continuance is necessary to allow a defendant adequate time to obtain counsel, when needed to guarantee continuity of counsel to either party, or when necessary to permit either party reasonable time for effective preparation of the case.

18 U.S.C. § 3161(i)

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

Derivation

First appeared in 1972 Senate subcommittee bill, § 3161(d) (p. 300). This provision was identical to the final version except that it provided that the defendant shall "be deemed arraigned on the information or indictment," and referred to an order permitting withdrawal of "the plea of guilty."

1974 Senate committee bill, § 3161(i) (p. 317). Substituted "be deemed indicted" for "be deemed arraigned on the information or indictment."

1974 House subcommittee bill, § 3161(i) (p. 343). Eliminated "of guilty" from the phrase about an order permitting withdrawal of a plea.

1974 House committee bill, § 3161(i) (p. 343). No change.

No House floor amendments.

1974 act, § 3161(i) (p. 378).

Not amended in 1979.

There was no similar provision in the ABA standards.

Materials Addressed to Original Ervin Bill

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 252

Section 3161(b)(1) also fails to take into account the relative ease with which pleas of guilty may be withdrawn prior to sentence. In view of this fact, it is present practice not to dismiss counts to which no pleas are entered until after sentencing on the plea. Under section 3161(b)(1) a defendant could enter a plea of guilty on the 59th day after his arrest but because the preparation of a presentence report may take approximately four weeks, should he subsequently change his mind and withdraw his plea of guilty there would be no possibility of prosecuting him on other counts which may not yet have been dismissed. Indeed, the proposed language makes it doubtful that after the expiration of the 60-day time period a defendant could even be prosecuted with respect to the charge to which he pleaded guilty but subsequently withdrew his plea of guilty.

This problem becomes especially acute in situations where the plea of guilty is entered pursuant to Rule 20 of the Federal Rules of Criminal Procedure. In such cases, should the defendant change his mind and withdraw his plea of guilty, he would have to be transferred to another district for trial. Obviously, this process could not be accomplished within the time period specified.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262-63

Section 3163(f) of the proposed amendments set forth the language that was adopted in the 1972 Senate subcommittee bill.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 259

Section 3163(f) makes provision for cases involving the withdrawal of a plea of guilty or nolo contendere. Without a provision of this nature, a defendant could withdraw his plea after the expiration of the time limits and move for dismissal. Similarly, he could withdraw the plea late in the time limits and leave the Government with little time to prepare its case in order to meet the time limit. For these reasons, we think this provision is essential.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 54

The commentary on this provision in the draft report was virtually identical to the commentary at pages 41-42 of the 1974 Senate committee report, set forth below.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 41-42

Subsection 3161(i) provides that where a defendant pleads guilty and then withdraws his plea that the time limits commence again on the date the plea is withdrawn.

This provision added at the suggestion of the Justice Department, takes into account the relative ease with which pleas of guilty may be withdrawn prior to sentence. Under S. 895, without such a provision, it was possible for a defendant to enter a plea of guilty on the 59th day to one of several charges and wait several weeks, and then withdraw his plea before sentencing, thereby frustrating any prosecution on the other counts which might not yet have been dismissed. It was even possible under the original language that the Government would have been unable to prosecute the defendant with respect to the charge to which he pleaded guilty but subsequently withdrew the plea.

The Committee followed the Justice Department's proposed solution to this problem in providing that the time limits start all over again on the day that a withdrawal of a plea becomes final. Therefore the day on which the defendant withdraws the plea is treated as the initiation of a legitimate subsequent prosecution. If a defendant pleads guilty to a charge on the 59th day after arrest and then withdraws his plea, the withdrawal of plea is treated as the first day of a new prosecution with 60 days remaining in which to try the defendant.

18 U.S.C. § 3161(j)

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

Derivation

First appeared in 1974 House subcommittee bill, § 3161(j) (p. 344).

1974 House committee bill, § 3161(j) (p. 344). No change.

No House floor amendments.

1974 act, § 3161(j) (p. 378).

Not amended in 1979.

ABA standard 3.1 was similar.

Materials Addressed to Original Ervin Bill

Testimony of Senator Philip A. Hart, 1971 Senate Hearings 22

Section 3161(c)(3) of this bill exempts from the measured period of 60 days, time when the defendant is "unavailable." It is not clear whether this includes time when the accused is serving a prison sentence on a conviction for State or Federal crime. This issue of speedy trial for someone serving another sentence should also be clarified in these hearings. It may seem at first blush that a prisoner's right to speedy trial is less important. But the Supreme Court pointed out, in *Smith* v. *Hooey*, 393 U.S. 374, that there are several reasons why he too suffers from undue delay.

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 82

On page 4 of the bill—no, excuse me, on page 4 of the Second Circuit rule, Paragraph 7 of that spells out the duty of the U.S. attorney, and it puts upon him an affirmative duty, if a person is imprisoned someplace in a State court and he is charged with a Federal crime, to try to get the charge of the Federal crime settled right away. In other words, that must be promptly done, too, so that stale charges are not hanging over a person who is serving time in prison, and I would recommend to the committee the consideration of incorporating paragraph 7 of the January 5, 1971, rule of the Second Circuit into the bill.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3162(a)](5) The period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 258

Section 3162(a)(5) excludes a period of delay resulting from the detention of the defendant in another jurisdiction. Adapted from the Second Circuit Rules, it also requires that the prosecution have been diligent in its efforts to obtain the defendant's presence for trial. We feel that this provision is desirable since not infrequently (1) a defendant is in custody in another jurisdiction at the time he is indicted, or (2) a defendant is subsequently committed to custody in another jurisdiction after indictment, but before trial. Since time is required to prepare and serve a writ of habeas corpus *ad prosequendum* in order to secure the defendant's presence the period of delay should be excluded from the 180-day limit.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 22

In cases where the accused is already serving a term of imprisonment either within or without the district, the attorney for the Government is required to promptly initiate procedures to protect the defendant's right to speedy trial by either seeking to obtain his presence for trial or filing with custodial authorities a detainer and request to advise the defendant of his right to demand trial. Upon receipt of such detainer, the official holding the prisoner must promptly advise him not only of that right, but also must apprise him of the charges lodged against him. If the detainee does exercise his right and demands trial, the custodian must certify that fact promptly to the prosecutor that caused the detainer to be filed who, after receiving the certificate, is then bound to obtain the defendant's presence for trial. After the prosecutor makes such a properly-supported request for temporary custody, the defendant must be made available for trial without prejudice to traditional rights in cases of interjurisdictional transfer. The computation of time for trial begins once the defendant's presence has been obtained, unless the court finds in considering his subsequent claim for dismissal, under the provisions of this legislation, that the prosecutor is responsible for unreasonable delay in either filing a detainer or seeking to obtain the accused person's presence.

1974 House Committee Report 34-36

Section 3161(j) extends the right to a speedy trial to prisoners and is new language added by the Subcommittee. Although such a safeguard is new to this legislation, it is not a novel idea. This provision is a reproduction of Standard 3.1 of the American Bar Association's *Standards Relating to Speedy Trial* as recommended by the Advisory Committee on the Criminal Trial in 1967, and approved by the House of Delegates in 1968. This particular standard also served as a model for a more general detainer provision in section 9(b) of the *Model Plan for the U.S. District Courts of Achieving Prompt Disposition of Criminal Cases*, which was promulgated by the Judicial Conference pursuant to Rule 50(b) and circulated to all Federal judicial districts for adoption.

In fashioning Standard 3.1, the ABA tracked a modern trend in State case law that holds that the government must exercise some degree of diligence in trying to obtain an imprisoned defendant's presence for trial, an appropriate development since "the legal uncertainties of extradition and the difficulties of travel and communication . . . have largely disappeared."* A significant number of States have either enacted the Uniform Mandatory Disposition of Detainers Act or some variation thereof, or have ratified the draft of An Interstate Agreement on Detainers. Both are premised upon the assumption that a prisoner who has had a detainer lodged against him for trial upon completion of his sentence is seriously disadvantaged thereby. It should be noted that the prisoner is not the only party prejudiced by such an arrangement:

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody, which bars him from treatment such as trustyships, moderations of custody and opportunity for transfer to farms and work camps. In many jurisdictions he is not eligible for parole; there is little hope for his release after an optimum period of training and treatment, when he is ready for return to society with an excellent possibility that he will not offend again. Instead, he often becomes embittered with continued institutionalization and the objective of the correctional system is defeated. [Council of State Governments, the Handbook of Interstate Crime Control, p. 86.]†

By adopting the Advisory Committee's detainer standard, the Committee also endorses the ABA's conclusion that—

> (s)uch a requirement is appropriate, for otherwise the prisoner's right to speedy trial could be circumvented by delay on the part of the prosecutor in lodging a detainer against him. It seems clear that a prisoner can be disadvantaged by delay even during the period when no detainer has been lodged against him. Indeed, delay in the trial of a

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*Ellipsis in original.

†Brackets in original.

> person serving a sentence on another offense can be even more prejudicial than otherwise, for the defendant in custody is in no position to find witnesses or otherwise preserve his defense. [*Standards*, Approved Draft, 1968, p. 35.]*

Further, since the Committee believes by endorsing H.R. 17409 that the Congress must set a proper example by enacting uniform national guidelines extending the right to a speedy trial, it would be anomalous indeed to exclude from such safeguards the class of defendants who stand to be most prejudiced by unnecessary delay. In that light, including a detainer proviso runs a parallel course with restoring the sanction of dismissal with prejudice to the legislation, because in both cases the right has very little meaning unless the prosecution is effectively encouraged to respect it.

Section 3161(j)(1) sets forth what is expected of the attorney for the Government when he becomes aware of the fact that the defendant against whom charges have been filed is already imprisoned and serving a sentence pursuant to a prior conviction. In such instances, the prosecutor has two options: he must immediately initiate procedures either to obtain the defendant's presence for trial or furnish the defendant the opportunity to demand trial when the prosecution does not choose to undertake an immediate trial. With respect to the term "promptly" as used in this subsection, the Committee intends that the attorney for the Government—or the custodial official, as provided in paragraphs (2) and (4) of Section 3161(j)—shall initiate detainer or demand certificate procedures as soon after he becomes aware of the fact that the accused is imprisoned as is practicable.

Section 3161(j)(2) sets forth the duty of the custodial officer (a) to give appropriate notice to the prisoner whenever he has received a detainer for that prisoner which, the Committee feels, should be in writing and should include the nature and other particulars of the offense as well as a complete statement of the defendant's right to demand trial; and (b) to inform the attorney for the Government who served the detainer of the prisoner's demand for trial which, to conform with State practice should be sent both to the prosecutor and court by registered or certified mail, return receipt requested. In addition, such notice of demand for trial by the custodial official, in the opinion of the Committee, should set forth the term of commitment under which the prisoner is being held, time already served and remaining to be served on the new sentence, good time earned, time of eligibility for parole of the prisoner and any decisions of appropriate parole authorities relating to the prisoner.

Section 3161(j)(3) makes it clear that once a demand for trial is received, the attorney for the Government must act promptly in seeking to obtain the presence of the prisoner for trial, whether he be incarcerated within or without the jurisdiction in which the charges are pending. In view of the fact that the section requires notice to the prisoner of the charges and establishes a procedure for demanding trial, the Committee feels it is unnecessary to require the attorney for the Government to proceed in those cases in which demand has not been made; again, however, it should be noted that the prosecutor should act as soon as practicable after notification of demand is received so as to minimize prejudicial delay.

Section 3161(j)(4) requires the custodial official to release the prisoner to the attorney for the Government for trial upon receipt of a properly-supported request for temporary custody, subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery. In preserving the defendant's right to challenge the legality of his being surrendered by the custodial authority, the Committee does not intend in any way to change existing law with respect to extradition or transfer of and responsibility for custody in cases where more than one jurisdiction is involved.

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*Brackets in original.

Any reading of this legislation should make it clear that proceedings regarding a prisoner against whom charges are brought while he is serving a term of imprisonment pursuant to an earlier conviction are "proceedings against the defendant" in the same sense as provided in section 3161(h)(1), and that delay resulting from such proceedings, therefore, is excludable and tolls the time limits set forth in section 3161. It should be equally clear that the time for trial begins to run as soon as the prisoner is arraigned, which must occur within ten days either of filing of charges or the date the defendant has been ordered held to answer and has appeared, whichever happens last, as set forth in Section 3161(c). Consequently as soon as the prisoner's presence for trial on charges pending against him has been obtained, the time limits during which he must be brought to trial begin; this means that, if the prisoner does not waive his right to contest the legality of the demand for temporary custody, any time period consumed by proceedings, related to that contest is excludable from the time allowed to bring the prisoner to trial, for the reasons stated above. Similarly, if the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under section 3161(a)(2).* In addition, the Committee feels that, since the prejudice an incarcerated defendant may suffer is potentially so great, the attorney for the Government is also subject to sanction for such unreasonable delay under section 3162(b)(4). The Committee does not believe that this imposes any hardship upon the attorney for the Government since, unlike state practice in many jurisdictions where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for purposes of pleading.

18 U.S.C. § 3162(a)

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the

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*So in original. Probably should refer to section 3162(a)(2).

burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Derivation

Mikva bill, § 3162(b) (p. 282): "If a defendant is not brought to trial as required by section 3161 the information or indictment shall be dismissed on motion of the defendant. Such dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined with the offense. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty shall constitute a waiver of the right to dismissal."

Original Ervin bill, § 3162 (p. 290). Changed the first phrase to read "If a defendant, through no fault of his own or his counsel, is not brought to trial as required by section 3161, ..."

1972 Senate subcommittee bill, § 3162(a) (p. 301). Eliminated the reference to fault in the first sentence. Added a sentence placing the burden of proof on the defendant, except that the burden of establishing the exclusion for absence or unavailability of the defendant was placed on the government. Added offenses "based on the same conduct or arising from the same criminal episode" to the class for which prosecution was barred. Added the reference to pleas of nolo contendere in the sentence providing for waiver.

1974 Senate committee bill, §§ 3162(a), (b) (pp. 317, 318). Added a new paragraph requiring that a charge contained in a complaint be dismissed or otherwise dropped if no indictment or information was filed within the separate time limit which this bill introduced. The new paragraph was similar to the final version of section 3162(a)(1), except that it stated that subsequent prosecution was not barred. With respect to the time limit to trial, this bill put the burden of proof on the defendant to justify the dismissal in all cases, but assigned "the burden of going forward with the evidence" to the government in connection with the exclusion for absence or unavailability (which in this bill covered essential witnesses as well as defendants); again, the paragraph stated that subsequent prosecution was not barred. With respect to both time limits, section 3162(b) limited reprosecution "for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense" to cases in which the court found compelling evidence that the delay resulting in dismissal was caused by exceptional circumstances which the government and the court could not have foreseen or avoided.

1974 House subcommittee bill, § 3162(a) (p. 345). Changed paragraphs (a)(1) and (a)(2) to provide that dismissal on speedy trial grounds "shall forever bar prosecution of the individual for that offense or any offense based on the same conduct or arising from the same criminal episode." Eliminated the subsection dealing with the circumstances in which reprosecution was permitted.

1974 House committee bill, 3162(a) (p. 345). Added to both paragraphs that "dismissal with prejudice shall only apply to those offenses which were known or reasonably should have been known at the time of dismissal." Eliminated the references to offenses "arising from the same criminal episode."

Amended on House floor, 120 Cong. Rec. 41793-95, to eliminate the requirement of dismissal with prejudice and substitute the statement of factors to be considered by the court in determining whether the dismissal should be with or without prejudice. The amendment also eliminated the material dealing with the offenses that would be covered by a dismissal with prejudice. It also introduced the references to section 3161(h).

1974 act, § 3162(a) (p. 378).

Not amended in 1979.

ABA standard 4.1 was similar to the provision in the Mikva bill.

Editor's note: Language in sections 3161(d)(2) and 3161(e), introduced by the 1979 amendments, makes the sanctions applicable to the time limits set forth in those provisions. With respect to the burden of proof in cases of absence or unavailability, see the note under section 3161(h)(3).

Materials Addressed to Mikva Bill

Prepared Statement of Representative Abner J. Mikva, 1971 Senate Hearings 128-29

Section 3162 is the heart of the speedy trial requirement, or rather, the teeth. It provides sanctions for unexcused trial delays—criminal contempt if the delay is caused by the defendant or his attorney; dismissal with prejudice if the delay is the fault of the prosecution. In private conversations with sources in the Justice Department, it has appeared that dismissal represents an unacceptably harsh sanction as far as the Department is concerned. Again, by way of comparison, S. 895 provides only for dismissal; it makes no provision for punishing delays caused by the defense.

At the heart of the Justice Department's objection seems to be the feeling that not all delays which are attributable* to the defense are necessarily within the prosecution's control. This raises the question of whether additional sanctions should be authorized where delay is caused by the court itself. One suggestion has been a requirement that reports be filed with the Administrative Office of the Court explaining the reasons for delay of any case past the time limit.†

. . . .

It is impossible to lay blame for trial delay entirely on any single party—the court, the prosecutor, the defendant, or defense counsel. But it is clear that there is little incentive at present for any of the parties to vigorously pursue speedier trials. The caseloads of prosecutors and judges are staggering. Defendants who are free on bail are in no hurry to be tried. And those sitting in jail awaiting trial, the ones with the strongest interest in speedy trials, are also the ones with the least voice. Overwhelmingly they are poor. Overwhelmingly they are represented, if at all, by public defenders to whom they are little more than another file folder to be skimmed just before trial.

If we are serious about implementing a requirement of trial within 60-120 days after arrest, we must provide sanctions that have some teeth. Mere exhortations or inducements are unlikely to be effective. If the Justice Department objects to dismissal as indiscriminate and unfair to the diligent prosecutor, then let them come forward with serious alternative suggestions.

Letter to Representative Mikva from James R. Glover, Aug. 14, 1970, at 1971 Senate Hearings 192

Next to the sanction of criminal contempt, the strongest sanction which could be exercised by the trial judge for delay which can be attributed to the prosecution is dismissal of the action with prejudice against bringing a subsequent charge against the same defendant for the same offense. Somewhat less harsh variations of this sanction might also be applied by the trial court judge; dismissing the action without prejudice or dismissing the action and requiring approval of the trial court prior to a subsequent charge for the same offense. An additional sanction that might be employed would be to release from custody a defendant who has been unable to obtain his release prior to trial on bail or to release a bailed defendant from the obligations of his bond.

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 172

Under section 3162(b) it is provided that a dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined. The Department of Justice has adequately demonstrated to the Advisory Committee [on Federal Criminal Rules] that such a proviso is too drastic and in exceptional cases, may result in a miscarriage of justice. In the run-of-mill‡ case there would not be too great a problem, but the "exceptional" case will be the one which will meet the public eye. It may be that the Department of Justice could furnish a list of these "exceptional" cases which could be added to the antitrust, securities, or tax law trials which are excluded under section 3163(b).

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*So in original. Probably should be "not attributable."

†In his testimony, Representative Mikva added, "I would hope we could somehow avoid such a tremendous loophole through which a Mack truck can be driven." 1971 Senate Hearings 124.

‡So in original.

Materials Addressed to Original Ervin Bill

Testimony of Senator Philip A. Hart, 1971 Senate Hearings 21

Under S. 895, a criminal case will be dismissed with prejudice if not tried within 60 days and an extension of that deadline has not been obtained. The problem of effective sanctions is a tricky business. On the one hand, we should not penalize the U.S. attorney—and the public interest he represents—for reasons beyond his control. At the same time, a bill without teeth will only repeat the policy declarations from the judiciary and the bar favoring speedy trials.

After considering this problem, we have concluded that dismissal with prejudice is probably needed. A "rollover" provision for dismissal without prejudice, under which charges could be reinstated, would not afford adequate incentive to speedy trial, even if leave of the court were required. Such reinstatement is not a rubberstamp matter and might lead occasionally to the charges being dropped. But the deterrent effect of mandatory dismissal is far greater.

I am confident that courts and prosecutors faced with that prospect would rapidly find the wherewithal to speed up trials considerably, and to meet reasonable deadlines.

Nonetheless, the subcommittee should explore the issue of sanctions thoroughly so that this measure can have the full backing of all elements of the criminal justice system.

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 83

Now, on page 5, also under section 3162 of the bill, it provides that failure of the defendant to move for dismissal prior to entry of a plea of guilty shall constitute a waiver of the right to dismissal. It seems to me that where the defendant does make such a motion that the burden ought to be on him to prove the allegations of his motion, and that there ought to be a presumption of regularity in the proceedings.

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 5, line 19, immediately after the period, insert the following: "After the reading of the information or indictment the judge shall address the defendant personally and determine that the defendant understands his right to a speedy trial and his right to object to any periods of delay which have been determined to be excludable."

On page 5, line 21, immediately before the period, insert the following: "and waiver of the right to contest the determinations of excludable delays".

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34141 (Sept. 30, 1971)

The first two substantive changes on page 5 are designed to produce finality on the waiver questions. This language is essential to avoid yet another possibility for endless appeals on the various aspects of the right to a speedy trial.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 255-56

Proposed section 3162 provides for dismissal with prejudice of any case not tried within the time limitations prescribed in the preceding section. The section provides, however, that a defendant is entitled to move for dismissal only if he has not been brought to trial within the time limitation "through no fault of his own or his counsel." It is not specified what the term "fault" means. The ordinary meaning of that term implies a negligent failure or omission or even a moral factor. Hence, it could be argued that a defendant's illness and hospitalization would not prevent the running of the 60-day time limitation. The status of delays caused by the "fault" of the defendant's counsel presents additional problems. While the statute indicates that under such circumstances a defendant would not be entitled to move for a dismissal of the charges against him, it is unclear whether a defendant could subsequently move to set aside his conviction due to an "ineffective assistance of counsel" if the delay was due to the fault of his counsel. We believe that adequate provisions should be made to resolve these questions. We suggest that the concept of "fault" be entirely eliminated and that the test be simply one of whether the time limitation has been exceeded.

Section 3162 also provides that the failure of a defendant to move for dismissal prior to trial or entry of the plea of guilty shall constitute a waiver of right to dismissal. This provision immediately raises the possibility that in every case, due to the vagueness and uncertainty of the provisions of this bill, a motion will be made to dismiss which will require an evidentiary hearing concerning the reasons for delay in a particular case. This, of course, would consume considerable court time. To provide against this contingency, we suggest that a provision be made requiring a defendant to have the burden of proof in support of a motion to dismiss under this bill.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 262

[§ 3163](a) If a defendant is not brought to trial as required by section 3161, the information or indictment shall be dismissed with prejudice but only prior to the commencement of trial, after hearing upon motion of the defendant with notice to the government, and an affirmative showing by the defendant that the time limitation of section 3161 has been exceeded. Any such motion not ruled upon by the court prior to the commencement of trial shall be deemed denied.

(b) Failure of the defendant or his counsel to move for dismissal prior to commencement of trial or entry of plea of guilty or nolo contendere shall constitute a bar to a dismissal under this chapter.

(c) An indictment or information shall not be dismissed if it is not tried as required by section 3161 because of the defendant's neglect or failure to appear, in which case, he shall be deemed to be arraigned within the meaning of section 3161 on the date of his subsequent appearance before the court on a bench warrant or other process or surrender to the court.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 259

New section 3163 sets out various sanctions and exclusions. Section 3163(a) substantially retains the present provision of S. 895 providing for mandatory dismissal with prejudice if the defendant is not tried within the 180-day period. However, our amended section insures that there must be a timely demand for dismissal, and that after commencement of trial, the court has no further authority to dismiss. This would discourage assertions of allegedly unknowing or mistaken waivers after the trial has commenced. The provision requiring the defendant to make an affirmative showing that the time limits have been exceeded is intended to preclude frivolous motions for dismissal and *sua sponte* dismissals by the court without having heard both parties on the issue.

Section 3163(b) retains a similar provision of S. 895 as to waiver of the dismissal right by providing that failure to move for dismissal prior to commencement of trial, or a plea of guilty or *nolo contendere* is a bar to a dismissal under this chapter.

Section 3163(c) makes provision for the situation where a defendant becomes a fugitive. We have alluded to the problem posed where the defendant becomes a fugitive near the end of the time period (*e.g.*, on the 178th day), and is subsequently captured after a lengthy absence. In this case, S. 895 would require that the Government try the defendant within the days under the 180-day limit which had not expired (*e.g.*, 2 days). Obviously, it would be impossible for the Government to marshal the evidence on such short notice where only a few days remain upon re-apprehension of the defendant. Thus, the section contains a provision which allows a new time period to run in such cases.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 263

[§ 3164](a) A denial of a motion to dismiss pursuant to section 3163(a) shall not be reviewable under the provisions of Title 28, United States Code, Section 2255.

(b) The United States may appeal an order against the United States granting a motion to dismiss with prejudice pursuant to section 3163(a).

Explanation of Proposed Amendments in Letter To Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 260

Section 3164(a) provides a clear expression that the provisions of this chapter do not rise to constitutional proportions. The denial of a motion to dismiss would be reviewable on direct appeal, but after that it could not be re-litigated by collateral attack under the present provisions of 28 U.S.C. § 2255. . . .

Section 3164(b) merely gives the United States the right to appeal a motion to dismiss granted pursuant to 3163(a).

Letter to Lawrence M. Baskir, Chief Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Bruce D. Beaudin, Apr. 6, 1970, Commenting on Draft of Original Ervin Bill, 1971 Senate Hearings 162

§ 3162. I have a problem with section (b) which provides for dismissal if there is no timely trial "through no fault of [the defendant] or his counsel."* If counsel has been inept and dilatory, and if the Government has "ridden along with the tide" I don't see how the VI Amendment can fail to operate for dismissal. I feel the words "or his counsel" should be stricken.

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 173

The sanctions provisions of section 3162 in both H.R. 15888 and S. 3936 are substantially made [*sic*]. Once again, I emphasize the importance of serious consideration to that portion of the proposed statute which provides that "dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined with the offense."

Letter to Senator Ervin from Richard H. Seeburger, Oct. 5, 1970, at 1971 Senate Hearings 195

§ 3162, it seems to me, is a bit severe in that it would forever bar prosecution of a very serious crime because of a minor bureaucratic slip-up where no prejudice to defendant is shown. Perhaps something less stringent ought to be a first sanction, such as releasing the defendant on his own recognizance and require the Government to show no prejudice to the defense as a pre-condition of the reindictment. The second delay to trial could warrant a more severe sanction, such as barring prosecution.

Letter to Senator Ervin from Robert G. Polack, Oct. 8, 1970, at 1971 Senate Hearings 177

I think that the provisions of Section 3162 are much too lenient. It seems to me that if a defendant, through no fault of his own or of his counsel, is not brought to trial in the short period required by Section 3161, instead of setting him free to continue to prey upon the public there should be a punishment levied against the Judge or the U.S. Attorney responsible for the failure to bring him to trial.

. . . [I]t seems to me that if the defendant is not in custody there is less reason for applying the time limitations and sanctions in his favor than if he is in custody. Here, again, it seems to me that the statute should be directed toward some form of discipline against those charged with expediting trial instead of in favor of the defendant charged with the offense.

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*Brackets in original.

Letter to Senator Ervin from Edward L. Barrett, Jr., Oct. 26, 1970, at 1971 Senate Hearings 159

I am not certain whether it would be wise to start out with a provision requiring dismissal without right of retrial. Defendants might be encouraged to play games with the system. The necessary imprecision of many of the extension provisions in § 3161(c) means that a new issue would be introduced for appellate litigation—with the government appealing dismissal motions and the defendant raising the issue on appeals from convictions. Perhaps we could first try something along the following lines to see if it works:

(a) Permit either the defendant or the government to raise the delay issue.

(b) Require the court to calendar each case which has not been brought to trial on the 90th day after arrest, etc., and weekly thereafter for a showing by the government why the case has not been brought to trial.

(c) Permit the court to deal with delay beyond the statutory period by the following devices:

(i) Jeopardy dismissal if it finds unnecessary and prejudicial delay caused by the government.

(ii) Mandatory release of the defendant from custody plus an order requiring the trial to commence on a date certain within 30 days on pain of a jeopardy dismissal.

(iii) If it finds the defendant responsible for delay, an order revoking bail or other release and returning the defendant to custody along with an order setting a date certain for trial.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 54-55

The sanction against the U.S. attorney and the court for failure to comply with the speedy trial time limits is the dismissal with prejudice of the prosecution. For a discussion of similar provisions being used in State speedy trial schemes and the committee's reasoning in adopting the dismissal sanctions, see pages —.

At the suggestion of the Justice Department, the bill, as reported, adds language which places the burden of proof upon the defendant when he makes a speedy trial dismissal motion. The Government would still have the burden of establishing an exclusion because of a defendant's absence or unavailability under subparagraph 3161(c)(3). Also at the suggestion of the Department, the new section would eliminate the requirement that to succeed on the dismissal motion the defendant must show lack of fault for the delay. The bill as amended also would add "nolo contendere" to the last sentence so that a plea of nolo contendere, like a plea of guilty, would constitute a waiver of the right to dismissal under the section.

Opening Statement of Senator Ervin, 1973 Senate Hearings 3-4

A time limit without enforcement is merely an empty plea. The only effective enforcement mechanism anyone has suggested is the dismissal sanction. It is effective because it gives one of the participants in the criminal justice process, defense counsel, a selfish reason to seek speedy trial. I recognize that outright dismissal is a harsh sanction but it is the only one that promises to be effective. If the Justice Department, or anyone else, can come up with an alternative means of enforcing these limits, I will welcome that suggestion.

Since a sanction against only one or two of the parties is not only unfair, but makes for defective legislation S. 754 also has other sanctions on the defendant. These were offered by the Justice Department and Senator Thurmond as a means for ensuring that the defense also is under the gun on speedy trial.

To many, these sanctions may seem harsh. There are two answers to that complaint. First, it is now clear that no one will be motivated unless the penalty for delay is clearly stated. Second, I am confident that neither the courts or the prosecution will sit on their hands under the threat of dismissals.

Faced with these sanctions, the courts will ensure that the necessary improvements are made. I will be very surprised to find that the Justice Department will tolerate any business-as-usual attitude on the part of a U.S. Attorney which results in a dismissal. And I also have no fear that judges will blithely sit by and permit the red-tape and antiquated methods of their courts to be the cause of a dismissal. With dismissal as a sanction I have no doubt the trials will be speedy. Without a dismissal, I am equally persuaded we will see no improvement.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 167-68

Senator McClellan offered two amendments in the alternative that were concerned with the dismissal sanction. One would have eliminated the dismissal sanction by striking section 3162(a) from the subcommittee bill. The other would have deferred the effective date of the dismissal sanction, and is treated herein as part of the history of section 3163(c).

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 164-65

Under S. 754, as now drafted, a violation of the sixty day rule would lead to dismissal [§ 3162(a)].*

This amendment is drafted in alternative versions.

The first would eliminate the sanction of dismissal.

The second would postpone the effective date of the sanction until the end of the first full year of the implementation of the sixty day rule.

It can be argued that the dismissal sanction is assessed against society while the fault of delay is attributable to the defendant, his counsel, the prosecutor or the court. Delay under the Sixth Amendment must normally be accompanied by prejudice relating to the ability of the defendant fairly to defend his innocence. Consequently, the use of a dismissal sanction there is distinguishable. In any case, the sanction should not be applied until the provisions of the bill have been fully implemented. Assuming it is determined that the time limits cannot be met, it should not be necessary to have prosecutions aborted, while Congress rushes to change the provisions of the bill. Under either alternative of this amendment, Congress will be given an opportunity to study the operation of the bill before moving in with the ultimate sanction.

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*Brackets in original.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 168

In connection with the exclusion for absence or unavailability, it was proposed to change the Government's burden from a "burden of proof of establishing" the exclusion to a "burden of going forward with the evidence in connection with" the exclusion.

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 165

Under S. 754, as now drafted, the provisions of the bill place the burden of proof on the government to establish the absence of the defendant for purposes of exclusion [§ 3162(a)].*

This amendment would place the burden of going forward with the evidence on the government on this issue, but leave the burden of ultimate persuasion with the defendant on all aspects of a showing of lack of compliance with the mandate of the statute.

It can be argued that since the violation of his rights is the defendant's contention, he ought to carry the ultimate burden of persuasion.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 167

The following new paragraph was included in an amendment whose principal purpose was to provide separate pre- and post-indictment time limits:

> (a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed as required by section 3161(b) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. The dismissing or dropping of such charge shall forever bar prosecution for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 169

The following new subsection was suggested:

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*Brackets in original.

(d) Any error involving the granting or denying of a continuance pursuant to section 3161(c) [exclusions], or the denial of a defendant's motion pursuant to section 3162 to dismiss any information or indictment, shall not be ground for reversal of a conviction of such defendant, unless the reviewing court finds that a failure to so reverse would result in a denial of defendant's right to a speedy trial as required by amendment VI of the Constitution.

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 166

Under the present law the granting of a continuance to the government and the failure to grant a dismissal to the defendant would be grounds for possible error on appeal following a conviction.

This amendment would require a showing of a denial of the Sixth Amendment right to a speedy trial before a reversal could be obtained for a violation of the sixty day time period mandated by the statute.

It can be argued that once the delay has already occurred there is no value in reversing a case under the statute unless the violation of the defendant's rights also rises to the level of a Sixth Amendment violation. The mere failure to live up to a provision of the statute ought not result in a guilty man going free.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 193

The following comments, although written after subcommittee approval of the bill, were apparently based on a draft submitted to the Justice Department beforehand:

> In addition to the dismissal of an offense not tried within sixty days, Section 3162 would bar prosecution for any offense based on "the same conduct or arising from the same criminal episode". This language marks a departure from existing law on joinder of offenses, and it would lead to the dismissal of cases which could not, because of possible prejudice to the defendant, be joined with the offense dismissed. Also, by barring the prosecution of "any other offense required to be joined with the offense," the trial of offenses severed by the court would be prohibited. To avoid this result, we recommend that the sentence beginning on line 4 and ending on line 7 of page 7 of the proposed amendment be deleted.*

Statement Submitted for the Record by Dallin H. Oaks, 1973 Senate Hearings 139-40

In my view, the most serious deficiency in S. 754 is the provision in Section 3162(a) that if a defendant is not brought to trial within the times specified in the Bill, the charges against him will be dismissed and the dismissal will "forever bar prosecution for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense." Although some sanction is required, the sanction of mandatory dismissal with prejudice is too radical.

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*Probably refers to the sentence beginning on line 15 and ending on line 18 of page 7 in 1972 Senate subcommittee bill.

The suggested justification for barring further prosecution—an automatic acquittal—is that only by having such a severe penalty can prosecutors and other public officials be forced into giving defendants their constitutional rights. This is another manifestation, like the Exclusionary Rule, which I have criticized in another context [footnote omitted], of the curious technique of creating a rule under which the guilty go free in order to compel public officials to engage in certain behavior. At a time when the effectiveness of the Exclusionary Rule has been called into question by numerous capable scholars who have examined its effects, and where the best that can be said in its favor is that there is no better proven alternative available, I find it astonishing that this same technique is being invoked in another area. Surely there are better ways to control the conduct of a limited number of prosecutors and judges than by a remedy so radical as mandatory acquittal of persons most of whom are, according to statistics, guilty of serious crimes.

One of the unfortunate but certain effects to follow from the rule that bars further prosecution will be to divert substantial prosecutorial and defense resources into controversies over the various factual and legal issues created by the various critical provisions in S. 754. The stakes are so high that a time-consuming microscopic examination of all the fibres woven into this law is inevitable. For example, we can be certain that prosecution and defense will give a great deal of attention to the slippery question of causality suggested by rules phrased in terms of whether a delay that contributed to a period of time in excess of the statutory limits was one "resulting from" one of the seven causes specified in Section 3161(c)(1)(A)(i) through (v) and (c)(4) and (5). Further factual issues are involved in testing whether an absent defendant was "attempting to avoid apprehension or prosecution" (Section 3161(c)(3)(B)), or whether the amount of delay produced when a defendant is joined for trial with a co-defendant is "reasonable" (Section 3161(c)(7)). Controversies are also likely to arise over the basis and adequacy for a judge's findings that the "ends of justice and the best interest of the public as well as the defendant" are served by a period of delay (Section 3161(c)(8)). Finally, since the mandatory dismissal not only bars prosecution for the charged offense but also for other offenses "based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense," (Section 3162(a)), and since those critical phrases are extremely general in application, extensive resources of time will inevitably be committed to resolving controversies over the scope of the acquittal.

All of the controversies, diversions and losses of time described above would be rendered largely unnecessary if a dismissal resulting from exceeding the statutory limits were *not* a final bar to prosecution.

I urge that S. 754 be amended to delete the provisions barring further prosecution (Section 3162(a)), and to substitute a less radical sanction. The whole problem of sanctions is best approached in stages, and the radical remedy currently specified in Section 3162(a) would be appropriate only after experience had proven that a lesser penalty was totally insufficient to attain the desired end. Because of the high standards of personnel and other differences in the federal system, we should not assume that remedies that are said to have proven unsatisfactory in state systems would fail in the federal system.

There are many possible alternatives, better known to the Committee than to me. They include dismissal, with the necessity of obtaining leave of court before charges are reinstated. Sections 1382 to 87 of the California Penal Code provide a mandatory dismissal with prejudice for misdemeanors, but not for felonies. I am informed that the difficulties entailed in filing new felony charges after dismissal for excessive delay provide a sufficient incentive for California prosecutors to try their felony cases within the specified limits in almost all instances. Another possible approach is suggested in a New Jersey provision (N.J.R. 3:25-2), which specifies that six months after formal accusation a court (on its own motion or on motion by the defendant) may set a case for trial on a certain day, and if the case is not tried on that day, the court may then dismiss the charge and such dismissal operates as an acquittal.

In conclusion, I urge that the Subcommittee not repeat the error of the Exclusionary Rule by a provision that would release persons indicted (and predominantly guilty) of felonies as a means of forcing a relatively small group of public officials to implement the constitutional right of speedy trial for persons accused of crimes. The bar to further prosecution specified in Section 3162(a) is radical and unnecessary. There must be equally effective and far less costly ways of controlling the actions of dedicated public servants.

Letter to Mark Gitenstein, Counsel, Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, from Richard A. Hauser, Attorney-Advisor, Office of Criminal Justice, U.S. Department of Justice, June 12, 1973, at 1973 Senate Hearings 197-98

Section 3162 requires the dismissal of any criminal case not tried within 60 days and bars the prosecution of ". . . *any offense based on the same conduct or arising from the same criminal episode*, and any other offense required to be joined with the offense." (emphasis added).* It would appear that this provision has a twofold purpose: (1) to limit a defendant's exposure to the expense and ordeal of successive or repeated prosecutions; and (2) to prevent the government from circumventing the dismissal provisions of S. 754.

While the public has an interest in preventing such abuses, the public's interest in bringing all legitimate, though successive, prosecutions should not be diminished or foreclosed. As a general rule, there can be only one prosecution for a continuing crime, but it is well settled that a single act may constitute two or more distinct and separate offenses for which a defendant may be separately tried, convicted and punished. *Gore* v. *United States*, 357 U.S. 386, (1958). The fact that two or more charges relate to and grow out of one transaction does not make a single offense where the charges are defined by statute. *Morgan* v. *Devine*, 237 U.S. 632 (1915). In order to promote economy and efficiency and to avoid a multiplicity of trials, the Federal Rules of Criminal Procedure permit the joinder of offenses that "are of the same or similar character or are based on the same act or transaction, or on two or more acts or transactions connected together or constituting parts of a common scheme or plan," but these objectives must give way if they would substantially prejudice the defendant's or the government's right to a fair trial. See Rules 8 and 14, *F.R. Cr. P.* Section 3162 seems to view joinder as mandatory and, as such, significantly departs from existing law.

Consider the complications that would arise under the dismissal provisions of S. 754 given the following hypothetical situations.

The defendant, previously convicted of a felony, was confronted in the act of burglarizing a United States Post Office in Atlanta, Georgia, by two postal inspectors who had responded to a silent alarm. In the gunfire that ensued, one officer was killed and the other injured. The defendant then escaped to the mountains of North Carolina in a vehicle which he had previously stolen along with postal money orders valued at $10,000.

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*Ellipsis in original.

If the grand jury returned an indictment charging the defendant with burglary and he was not timely tried on that charge, Section 3162 of the proposed bill would require the dismissal of any other charge "based on the same conduct or arising from the same criminal episode." Under this factual situation, that would include 18 U.S.C. § 1707 (Theft); 18 U.S.C. § 1114 (Murder of a federal law enforcement officer); 18 U.S.C. § 111 (Assault on a federal officer); 18 U.S.C. § 2312, (Interstate transportation of a stolen motor vehicle); 18 U.S.C. § 2314 (Interstate transportation of stolen property); 18 U.S.C. § 922(g), (Unlawful transportation of a firearm).

Varying the above hypothetical slightly, assume that the postal inspectors did not arrive at the scene of the burglary, but were murdered several days later when they attempted to apprehend the defendant in his mountain hideout. Are these murders considered offenses "based on the same conduct or arising from the criminal episode?"

It is interesting to note that quite a contrary result would obtain if the defendant were timely tried. In that event, there would be no prohibition against prosecuting him on the other offenses. Certainly the rules of joinder would not require the government to include all the offenses in one indictment, and it would be manifestly unfair to the defendant for the government to do so.

In an analogous situation, Justice Harlan noted:

> ". . . that a criminal trial is, even in the best of circumstances, a complicated affair to manage. The proceedings are dependent in the first instance on the most elementary sort of considerations, e.g., the health of the various witnesses, parties, attorneys, jurors, etc., all of whom must be prepared to arrive at the courthouse at set times. And when one adds the scheduling problems arising from case overloads, and the Sixth Amendment's requirements that the single trial to which the double jeopardy provision restricts the government be conducted speedily, it becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."*
> *U.S.* v. *Jorn*, 400 U.S. 470, 479-480 (1970).

In my view, it would not be in the public's interest for Congress to adopt a mechanical rule which would automatically prohibit the trial of other offenses whenever the case is dismissed for failure to comply with time limits. Therefore, it is my suggestion that Section 3162 of the bill be modified by deleting the words "any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense." This change would restore the bill to the boundaries of existing law.

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*Ellipsis in original.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 2-3

DISMISSAL WITH PREJUDICE.—The bill as introduced contained a provision requiring dismissal with prejudice if a case extended beyond the time limits. At the suggestion of Senators Hruska and McClellan this provision has been replaced with a dismissal without prejudice sanction.* However, beginning the 7th year after enactment a prosecution can only be recommenced following a dismissal without prejudice if the Government can show "exceptional circumstances."

1974 Senate Committee Report 21-22

A key aspect of the legislation is the imposition of sanctions, primarily that of dismissal, for failure to meet the limits specified. The mere existence of the technology necessary to unclog the court calendars and even the existence of court personnel trained in that technology will not by themselves result in speedy trial. Only when the system is committed to the goal of speedy trial will these techniques and personnel be put to work. That will not happen unless judges, prosecutors and defense counsel are held accountable for the failure to achieve speedy trial. The most effective means is through the use of sanctions. The dismissal sanction has the effect of compelling judges and prosecutors to choose between speedy trial or no prosecution whatsoever.

1974 Senate Committee Report 27

This section declares that if the case is not brought to trial within the prescribed period the charges shall be dropped and that a subsequent prosecution can only be brought in the limited circumstance where the Government can establish "exceptional circumstances." Dismissal with limited reprosecution would only be imposed beginning the seventh year after enactment, but dismissal without limitation on reprosecution would be imposed during the fifth and sixth years after enactment.

1974 Senate Committee Report 42-43

The sanction against the United States attorney and the court for failure to comply with the speedy trial time limits is dismissal of the prosecution. For a discussion of similar provisions being used in State speedy trial schemes and the Committee's reasoning in adopting the dismissal sanctions, see pages 15-17.†

The mandatory dismissal section is the most controversial provision in S. 754. The Department originally endorsed mandatory dismissal with prejudice when Assistant Attorney General Rehnquist appeared before the Subcommittee on behalf of the Department but for the past two years the Department has opposed this aspect of the bill. The issue of mandatory dismissal was discussed at some length during the April 17, 1973 hearings conducted by the Subcommittee. Both the Department and Carol Vance of the National District Attorneys Association were attracted by Professor Dallin Oaks' suggestion that a dismissal without prejudice provision might be an acceptable alternative.

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*The suggestion of Senators Hruska and McClellan is apparently not in the public record.

†The material referred to is not reproduced herein. It expresses approval of the position in the ABA standards and emphasizes the incentives created by the dismissal remedy.

Professor Oaks suggests that the Subcommittee look to the California speedy trial statute which provides dismissal without prejudice for failure to comply with the time limits. According to both Professor Oaks and Justice Winslow Christian, then Director of the National Center for State Courts, once a case is dismissed for failure to meet the speedy trial time limits in California it is rarely recommenced. That is because California judges impose a heavy burden upon the prosecution to justify its failure to meet the time limits on the first attempt. Therefore, this burden to justify reprosecution serves as a sufficient deterrent to failure to comply with the time limits while at the same time permitting reprosecution in extreme cases. According to Justice Christian, the metropolitan District Attorneys Offices in California very rarely fail to comply with the time limits. For example, in San Diego in an average year there were only three or four speedy trial dismissals out of 17,000 prosecutions.

The Committee has adopted Oaks' suggestion because of the California experience. S. 754, as amended by Committee, provides that charges be dismissed in cases where the defendant is not brought to trial within the time limits. However, the government can reinstitute charges if it presents compelling evidence that failure to meet the time limits in the first prosecution was caused by "exceptional circumstances which the government and the court could not have foreseen or avoided." This is intended to be an even higher standard than that provided in section 3161(h)(8), "ends of justice." Indeed, in order for the government to reprosecute there would have to exist circumstances which the government could not and did not know about before the original dismissal. For example, "exceptional circumstances" might apply where a defendant or his counsel perjured himself in alleging circumstances which led a judge to dismiss charges for failure to meet the speedy trial time limits. It might be impossible to reinstate the charges were it not for such a provision.

. . . .

At the suggestion of the Justice Department, S. 754 adds language which places the burden of proof upon the defendant when he makes a speedy trial dismissal motion. The Government would still have the burden of going forward with the evidence in connection with an exclusion under subparagraph 3161(h)(3). Also at the suggestion of the Department, S. 754 would eliminate the requirement, contained in S. 895, that to succeed on the dismissal motion the defendant must show lack of fault for the delay. S. 754 also adds "nolo contendere" to the last sentence so that a plea of nolo contendere, like a plea of guilty, would constitute a waiver of the right to dismissal under the section. The Committee assumes that any waiver of a defendant's right to speedy trial is an intelligent waiver and that a defendant has been informed by the judge of his rights under the statute prior to taking any action which would constitute a waiver to the right to dismissal under section 3162.

Testimony of Senator Ervin, 1974 House Hearings 161

I would like to make one final point. When S. 754 was introduced, it provided for dismissal with prejudice for violation of the time limits. Both of its predecessors in the prior Congresses had contained such a provision. Most opposition to the legislation centered around this provision. Opponents contended that dismissal with prejudice was too harsh a sanction for failure to comply with the time limits. However, those of us who were working on the legislation realized that without some sanction the time limits would be unenforceable.

The dismissal with prejudice sanction was part of the original proposal for speedy trial time limits contained in the American Bar Association's speedy trial standards which were the prototype for this legislation. The commentary to the speedy trial standards explained the reasons for the dismissal with prejudice provision as follows:

> The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.

However, on the Senate side opposition to this dismissal with prejudice provision was so intense that passage would have been impossible with such a provision. Therefore members of the Subcommittee on Constitutional Rights decided to preserve mandatory dismissal but permit reprosecution in exceptional circumstances. In filing new charges the Government would have to convince the court that the circumstances are not only exceptional but ones that neither the prosecution nor the court could have foreseen. I think that this provision preserves the principle advocated by the American Bar Association—that there must be an effective sanction for delay. Yet at the same time, it recognizes the possibility of unforeseeable delays. I can see that the House committee might decide otherwise and might conclude that mandatory dismissal with prejudice should be preserved without the exceptional circumstances provision. However, I felt you should be aware of the history of this provision in the Senate bill.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 201-02

At page 8, lines 16 and 17, amend section 3162(a)(1) by placing a period after the word "dismissed" and striking on line 17 the words "or otherwise dropped" and also on line 17 by striking the words "dismissing or dropping" and inserting the word "dismissal".

Comments

In the federal system charges are "dismissed".

At page 8, line 25, amend section 3162(a)(2), by deleting the period after the words "subparagraph 3161(h)(3)" and adding the following language: "in the absence or unavailability of an essential witness".

Comments

The above additional language is proposed because we believe patently unfair [*sic*] to require the government to have the burden of going forward with the evidence in explaining a defendant's absence or unavailability. The proposed additional language would leave the burden of going forward on the government with respect to absence or unavailability of an essential witness.

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 202-03

At page 25, between lines 9 and 10, amend Title I, by adding after section 3171, new sections 3172 and 3173 to read as follows:

> "§ 3172. *Dismissal by attorney for government*
>
> "The attorney for the government may *nolle prosequi* or dismiss an indictment, information, or complaint at any time prior to trial and the prosecution shall thereupon terminate. The entry of such dismissal or *nolle prosequi* shall not bar a subsequent prosecution. A dismissal shall not be filed during trial without consent of the defendant and leave of the court."

Comments

The Constitution provides that the Executive "shall take care that the laws be faithfully executed." Article II, Sec. 3. As part of this duty, the Executive branch has the sole responsibility for determining what charges should be brought against a defendant. *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967); *People* v. *Henzey*, 24 App. Div. 2d 764, 263 N.Y.S. 2d 678 (1965). "[A]s an incident of the Constitutional separation of powers, . . . the Courts are not to interfere with the free exercise of the attorneys of the United States in their control over criminal prosecutions."[*] *United States* v. *Cox*, 342 F.2d 167, 171 (C.A. 5, 1965), cert. denied, 381 U.S. 935 (1966), quoted with approval in *Newman* v. *United States*, 382 F.2d 479, 481 (C.A. D.C., 1967) (Burger, J.). Complete executive discretion has heretofore been specifically acknowledged by the courts, with respect to decisions to accept a plea to a lesser offense from one codefendant but not another, or to prosecute a defendant on a lesser or more serious charge. See *In Re Petition of United States For Writ of Mandamus*, 306 F.2d 737 (C.A. 9, 1962); *Newman* v. *United States, supra; Hutcherson* v. *United States*, 345 F.2d 964 (C.A. D.C., 1965); *United States* v. *Ammidown*, —— F.2d —— (C.A. D.C. No. 72-1964, Nov. 16, 1973).

In *Newman* v. *United States*, 382 F.2d 479 (C.A. D.C., 1967) (Burger, J.), the court stated in determining whether to reduce a charge, the prosecutor is acting not as an officer of the court, but as an attorney for the executive. As such "the courts have no power over the exercise of his duty within the framework of his professional employment." *Newman, supra*, at 481. *See also United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), *cert denied*, 381 U.S. 935; *Smith* v. *United States*, 375 F.2d 243 (5th Cir. 1967); *Pugach* v. *Klein*, 193 F.Supp. 630 (S.D. N.Y. 1961); *United States* v. *Shaw*, 226 A.2d 366 (D.C. App. 1967).

"Proposed Amendments to S. 754," Exhibit to Testimony of Assistant Attorney General W. Vincent Rakestraw, 1974 House Hearings 203

The department proposed the following new section to be added to title I of the bill:

SEC. 103. That part of Rule 48(a), Federal Rules of Criminal Procedure of Title 18, United States Code, being in conflict with the foregoing section 3172, is hereby rescinded and repealed.

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[*] Ellipsis in original.

Comments

See comment under 3172.

Prepared Statement of James L. Treece, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 207

Lastly, I feel that if the intention is to grant the chance to reinstitute a prosecution that has been dismissed that there should be a different test for right to reinstitute. If the test is whether an improper delay occurred that issue was already resolved against the prosecution when the case was dismissed. I feel it would be better if there were but one hearing and that were held before dismissal. Dismissal would then be with prejudice with no right to reinstitution. But a balancing test to prevent dismissal or for reinstitution should be available. Some of the criteria could be:

1. How heinous was the crime?
2. How highly probable is it that the prosecution will prevail?
3. Was the delay due to the fault of the prosecutor?
4. What prejudice will occur to the defendant if the case were reinstituted?

If the defendant is likely guilty and the crime was a vicious one and the defendant is not prejudiced by any delay in presenting his defense and the delay was not the result of aggravated negligence or incompetence on the part of the prosecutor, then there should be no dismissal in the first place.

Testimony of James L. Treece, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 214

I would propose there only be one hearing, personally, if I were drafting a bill. That there only be one hearing and if the court found at that hearing that there had been noncompliance, the case would be dismissed permanently with prejudice.

But at that hearing there be a balance of tests applied which considers rights of defendants, considers the rights of the public, considers the causes of the delay, and not just throw the whole thing out because of technical noncompliance.

Prepared Statement of Judge Alfonso J. Zirpoli, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1974 House Hearings 371

Under "Sanctions," we would suggest that the procedure of deciding whether a dismissal was valid only when the prosecution is sought to be reinstituted would be a most difficult and cumbersome procedure. We strongly suggest that the merits of the dismissal be tested before the indictment is dismissed, rather than after as § 3162(b) would require.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 9

The basic differences between H.R. 17409 and S. 754 are as follows:

. . . .

3. *Sanctions.*—H.R. 17409 provides that the failure to meet the speedy trial limits will result in the dismissal of the complaint, information, or indictment. This would forever bar prosecution of the defendant for any offenses which were known or reasonably should have been known at the time of the granting of the dismissal. This sanction becomes effective in the fifth year after enactment. S. 754 provides for the dismissal of cases in the seventh year for failure to meet the time limits, but permits reprosecution if the government can demonstrate exceptional circumstances.

1974 House Committee Report 23

In the event that the time limits of the bill, subject to the various exclusions, are not met, the court on motion of the defendant may dismiss the complaint, information or indictment against the individual. This sanction applies to both the period between arrest and indictment and between indictment and trial. The effect of a dismissal would be to bar any future prosecution against the defendant for charges arising out of the same conduct. Dismissal with prejudice would apply to those offenses which were known or reasonably should have been known at the time of dismissal. A defendant must move to dismiss the case prior to trial, entry of a plea of guilty or *nolo contendere*, or he waives the right of dismissal with prejudice on grounds that the requirements of this legislation were not met.

1974 House Committee Report 36-38

Section 3162 provides that, in the event the time limits of the bill, subject to the various exclusions, are not met, the court on motion of the defendant may dismiss the complaint, information or indictment against the individual. This sanction applies to both the period between indictment and trial [*sic*]. The effect of a dismissal would be to bar any future prosecution against the defendant on the same conduct. Dismissal with prejudice would apply to those offenses which were known or reasonably should have been known at the time of dismissal. A defendant must move to dismiss the case on grounds that his Sixth Amendment right to speedy trial has been denied under the provisions of this legislation prior to trial or entry of a plea of guilty or *nolo contendere*, or he waives the right. The dismissal sanction would become effective in the fifth year after enactment of the bill.

The dismissal sanction contained in S. 754 would permit the reprosecution of a defendant if the attorney for the Government can demonstrate the existence of exceptional circumstances. The Senate report cites as an example of an exceptional circumstance the case where "a defendant or his counsel perjured himself in alleging circumstances which lead a judge to dismiss charges for failing to meet the speedy trial time limits." The report also states that exceptional circumstances are those which the Government and the courts could not have foreseen or avoided. [S. Rept. No. 93-1021, p. 43.]* The Committee believes that permitting the reprosecution of a defendant whose case has been dismissed for failing to meet the speedy trial time limits could result in unnecessary expenses and may have a detrimental impact on the grand jury system, particularly in districts where criminal case filings are high. This danger was highlighted by Judge Feikens in his remarks to the Subcommittee:

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*Brackets in original.

> Another area of doubt is that engendered by a consideration of the technique of the bill's (S. 754) dismissal "without prejudice". I would think if I were you, of the impact on the grand jury system of re-indictments and the time requirements of re-indictment. [Hearings, page 239.] *

Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists. In addition, two witnesses—Mr. Charles Morgan, Washington Director of the American Civil Liberties Union, and Mr. Barris—added that as they read the decision, the Supreme Court's holding in *Strunk* v. *United States*, 412 U.S. 434 (1973), requires dismissal as the only appropriate remedy in cases where the right to speedy trial is abridged, despite the extreme nature of the remedy. With respect to the propriety of requiring a permanent bar to future prosecution, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee on their Commentary on *Standards Relating to Speedy Trial:*

> The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. [*Standards*, Approved Draft, 1968, pp. 40–41.]†

Finally, the Committee notes that the spokesman for the Judicial Conference, Judge Zirpoli endorsed the ABA position and offered some valuable insight into the realities of the legislative process now underway:

> Mr. COHEN. One final thing, what is your position with respect to dismissal of cases with conclusive prejudice against the Government?
>
> Judge ZIRPOLI. Personally, I would be disposed to accept the view—and I want to make one comment about that, very serious comment—I would be disposed to accept the view of the American Bar. Someone said, well, with rule 50(b), they didn't put those sanctions in effect. Senator Ervin couldn't get those sanctions in effect right away. We had to grapple with the Federal judiciary, we had to grapple with the Department of Justice, but we might get those sanctions included. But you couldn't get them in on the first year or the second year of operation of the plan, just as Senator Ervin couldn't get them in, and there is no reason why, given a little more history, the benefit of experience, we couldn't get then in. [Hearings, p. 382.] ‡

Section 3162(a)(1) was amended by the Committee to avoid confusion over what the rights of the prosecution are regarding reprosecution generally. Clarifying language was added, and ambiguous language dropped, to indicate that the bar on reinstitution of charges contemplates only those charges brought originally for offenses discoverable by due diligence on the part of the attorney for the Government. For example, if, after dismissal of the original indictment, the United States Attorney learns for the first time that the defendant engaged in prosecutable criminal conduct prior to dismissal of the charges, he may file charges based on that criminal conduct *as long as that conduct was unknown to him at the time the original indictment was filed, even though he made every reasonable effort to discover all such evidence of offenses, and no previous opportunity has presented itself to secure a new indictment or file an amended information.* Lesser included offenses of the original charges, of course, do not fit this definition. In making this clarification, the Committee assumes that the Federal courts will properly exercise their discretion under the terms of this legislation to prevent abuse.

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* Brackets in original.

† Brackets in original.

‡ Brackets in original.

Pursuant to questions that arose during discussion of the dismissal sanction, several points with respect to H.R. 17409 deserve clarification: first, as already indicated above, dismissal is *mandatory* but not *automatic*, since the defendant is expressly required under section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time; second, it should be clear that the attorney for the Government is free to contest the granting of a motion to dismiss on the basis of error by noting his exceptions and taking appeal in the proper manner; third, if this bill is enacted into law, it is contemplated that every defendant arraigned in Federal court be properly advised of his right to speedy trial under this legislation, along with the balance of his Sixth Amendment rights, prior to entry of plea. This latter point is especially crucial in the unlikely but plausible event the defendant is represented *pro se* at this juncture of the proceedings.

1974 House Committee Report 61

A new section 3162 provides the sanction of dismissal with prejudice on motion of the defendant for violations of time limitations.

Minority Views, 1974 House Committee Report 80-82

The heart of any speedy trial legislation is the remedy established for the failure to meet speedy trial standards. This legislation, in section 3162, adopts the harshest remedy possible by requiring the dismissal with prejudice of criminal charges which are not handled within the time limits established in the preceding section.

As in any legislative solution to a serious problem of the administration of justice, the question of a remedy involves the balance of countervailing policy considerations—in this case, the necessity of having a means of enforcing speedy trial time limits against the danger of releasing criminal defendants without a full and complete adjudication of their guilt or innocence. Without question there must be some means of ensuring that the speedy trial standards established by any legislative scheme shall be adhered to. Unless there is a compulsion on the participants of the court system—including the defendant as well as the prosecution and the court—it can be expected that speedy trial guidelines will be viewed as more of a prayer than command. We recognize that because of the character of the Sixth Amendment guarantee of a speedy trial, dismissal is "the only possible remedy." *Strunk v. United States*, 412 U.S. 434 (1973).

But apart from the nature of a constitutional "sanction," the legislative sanction contemplated by the bill should be tempered to meet sensible standards of justice as well as speedy trial time limits. The danger of a dismissal *with prejudice* sanction is that defendants who have committed serious crimes would be released into society. *See Barker v. Wingo*, 407 U.S. 514, 522 (1972). The supposed justification—that is, the compulsion of public officials to engage in certain behavior—is, in our view, a curious technical charade, and is improperly adopted in this bill. (*See* Statement of Professor Dallin Oaks, 1973 Hearings on Speedy Trial before the Senate Committee on the Judiciary Subcommittee on Constitutional Rights.) The enforcement of speedy trial standards must necessarily be outweighed by the society's right to have the guilt or innocence of a defendant determined:

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. *It does not preclude the rights of public justice. Beavers v. Haubert,* 198 U.S. 77, 87 (1905) (emphasis supplied)

Indeed, the Supreme Court has noted that the overzealous application of the dismissal sanction would infringe "the society [*sic*] interest in trying people accused of crime rather than granting them immunization because of legal error . . ."* *Barker v. Wingo, supra,* at 522, fn. 16; and *United States v. Ewell,* 383 U.S. 116, 121 (1966). Unless the right of a defendant to a speedy trial has been grievously violated, dismissal of charges and discharge of the defendant should not be permitted to frustrate the full operation of the judicial process.

The experience of states which have attempted to grapple with pretrial delay is instructive. More than thirty-five states have attempted either by court rule or by statute to eliminate pretrial delay in criminal cases. In many speedy trial statutes the sanction of dismissal and the effect of such dismissal is not specifically dealt with. A few state statutes specifically state that discharge is never a bar to subsequent prosecution. (*See* N.D. CENT. CODE § 29-18-06 (1969)). Several states permit dismissal or discharge with prejudice only for misdemeanors. (*See* UTAH CODE ANN. § 71-51-6 (1953)). But only a very small number of states permit absolute discharge for violation of speedy trial standards. (*See* FLA. STAT. ANN. Rule 3.191, Rules of Crim. Pro.) The overwhelming majority of states will not countenance complete discharge of criminal defendants, because of a failure of the system.

It is our earnest belief that a dismissal with prejudice sanction is abhorrent to a reasonable accommodation between the need for prompt disposition of criminal charges, and the right of society to protection from criminals. Even the remote possibility of the release of guilty defendants should mandate a lesser remedy if such a compromise is possible. In our view current federal law presents the more realistic approach to this problem. Under current federal law, the federal courts have the authority to dismiss criminal charges where unnecessary delay has occurred. Rule 48(b) of the Federal Rules of Criminal Procedure provides:

[Quotation omitted.]

This provision allows the court sufficient flexibility to dismiss charges either with or without prejudice as the facts of a particular case may warrant. This is a much preferred approach since it does not establish a blanket dismissal provision for all criminal cases, but allows sufficient discretion to the court to deal with each individual case as the ends of public justice require.

The amendment offered by Mr. Wiggins, and rejected by the Committee would continue current law. We will offer this amendment when H.R. 17409 is considered by the House.

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*Ellipsis in original.

Letter to Representative Peter W. Rodino, Jr., from Attorney General William B. Saxbe, Dec. 13, 1974, at 120 Cong. Rec. 41619-20

DEAR MR. CHAIRMAN: It is my understanding that proponents of H.R. 17409, the Speedy Trial Act of 1974, are determined to enact such legislation prior to the termination of the 93rd Congress.

As you know, the Department of Justice has consistently pointed out a number of significant problems with H.R. 17409. Our most serious objection to this legislation is the mandatory dismissal with prejudice provision contained in section 3162. This feature if enacted into law would ultimately provide that if a defendant is not indicted within 30 days following arrest or service of summons, or if the defendant's trial does not commence within 60 days following arraignment, the charge is dismissed with prejudice against prosecution for that offense or any offense based on the same indictment.

The Senate version of the bill, S. 754, although purporting to provide for dismissal without prejudice, contains a restrictive provision with respect to a new prosecution that for all practical purposes constitutes a dismissal with prejudice. If either the present House version or Senate version is retained the Department of Justice would be compelled to continue our strong opposition to this legislation.

Mandatory prejudicial dismissal of criminal cases not tried within arbitrary time limits can only serve to injure the public and our system of justice by releasing persons charged with crime without an adjudication. Not only may the untried defendant pose a danger to the public's welfare but the public confidence in a criminal justice system which releases persons without trial is certainly undermined.

The Department of Justice supports an amendment to section 3162 of H.R. 17409 deleting the bar to further prosecution following dismissal under that section. Deletion of this language would still result in dismissal of cases for failure to meet the time limits of section 3161 but would permit charges to be brought under a new information or indictment consistent with existing law. If this amendment is adopted a federal judge may dismiss with prejudice for denial of Sixth Amendment right to speedy trial or dismissal [*sic*] with prejudice where he believes circumstances warrant such dismissal.

Adoption of this amendment by the Congress would resolve the most significant difficulty in this legislation and would enable the Department to effectively administer the provisions of H.R. 17409.

I would hope that you and members of your Judiciary Committee and members of the House will support this amendment, copy of which is enclosed.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Charles E. Wiggins, 1974 House Floor Debate, 120 Cong. Rec. 41778

I understand that an amendment will be offered by the committee to remove the mandatory dismissal with prejudice and immunity language, and providing for a dismissal with or without prejudice as the court finds to be appropriate. This amendment must be adopted if the bill is to pass. I strongly recommend to the committee, the support of this amendment, and failing its adoption, that the bill be defeated on final passage.

Title I, as it finally evolved, does not work to change existing law in any far-reaching way. Defendants may still move for dismissal at any time, alleging a denial of the sixth amendment guarantees to a speedy trial. Such motions remain proper where prejudice is established even though the time limits of the bill have not run their course. However, after the time has run, a dismissal is mandated by the bill. Whether such a dismissal is to be with or without prejudice will turn on the circumstances of each case, and will reflect the sound judicial discretion of the court, if the suggested amendment is adopted. The amendment requires consideration of several factors by the court in arriving at a judgment.

No factor, nor combination of factors, requires, however, a particular form of dismissal. In most cases it is to be expected that no dismissal with prejudice will be ordered unless actual prejudice to the defendant can be shown occasioned by the further delay implicit in a refiling in the case against him, and that the actual prejudice to the defendant outweighs societal interests in prosecuting the alleged offender.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777-78

[Mr. COHEN.] The amendment I intend to offer later this morning will, I believe, remove any serious objection to this act by leaving dismissal with or without prejudice up to the court, again taking into account the case where justice might not be served by the strict 100-day limitation.

. . . .

Mr. DENNIS. As I understand the thrust of that argument,* rather than making the dismissal, when the time limits are exceeded, with prejudice so that no prosecution can be brought up again, this will make that question discretionary also with the court, as to whether he dismisses with or without prejudice.

Mr. COHEN. That is correct.

Mr. DENNIS. And then in that event, it lists certain factors here which the courts may consider as to whether they may dismiss.

Mr. COHEN. They will consider the gravity or seriousness of the offense, the reason why the case could not be prosecuted within the time limitation, and third, whether the ends of justice are, in fact, being served by dismissing with prejudice. These are factors normally the court would take into account anyway.

Mr. DENNIS. But then we feel the court normally does take into account those things at the present time, and normally would do that, and we think there ought to be written in here, as an additional factor, that the court should consider the degree of prejudice to the defendant's ability to prepare his case. In other words, if the court should feel there is no real prejudice to the defendant under the facts in his case in dismissing without prejudice, that is a proper factor to consider and that ought to be written in, too—not that the court could not consider it anyway, but why should that not be added?

Mr. COHEN. I have to disagree with the Department of Justice in that regard. They simply would confirm the existing practice—that he would have the normal time granted and then there would be dismissal, whether this was due to the laziness of the prosecutor or whatever, then they would start all over again. That frustrates the purpose of this act. We are trying to put some sanctions in to try to discipline our judicial system, the court, the prosecutor, and the defense counsel, and there are reasonable exclusions that take into account a variety of factors and give the courts some flexibility.

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*So in original. Probably should be "amendment."

But simply to say that we can start all over again if the defendant has not been prejudiced is not adequate because we are trying to move, to insure that the delay does not work to the advantage of the defendant.

We want him off the streets if he is guilty, and we want him to be able to have his innocence vindicated if he is innocent just as swiftly as possible.

Mr. DENNIS. I am not sure that if nobody is really, in fact, hurt, that the court should have to be bound by an inflexible rule.

Mr. COHEN. The public is the only one being hurt. Under our present system, society is being injured. That is who we are trying to protect.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41794-95

Mr. COHEN. Mr. Chairman, this is the most controversial section of the bill. I should point out that the committee's bill differs with the Senate version in that this requires a dismissal with prejudice at the end of the 5-year phasein period, if the 100-day limitation period were not met, which raised considerable opposition on the part of the Department of Justice notwithstanding the fact that the American Bar Association had recommended a dismissal with prejudice.

Judge Zirpoli, who testified before our committee, although he did not favor the particular measure, did support the dismissal with prejudice. U.S. District Judge Feikens from Michigan supported it. And as I look back through the report filed with the House, I would refer the attention of the Members to page 20, where Justice Rehnquist, then Assistant Attorney General, said the following:

> Therefore, we are unwilling to categorically oppose the mandatory dismissal provision. For it may well be, Mr. Chairman, that the whole system of Federal justice needs to be shaken by the scruff of its neck, and brought up short with a relatively peremptory instruction to prosecutors, defense counsel and judges alike that criminal cases must be tried within a particular period of time. That is certainly the import of the mandatory dismissal provisions of your bill.

Notwithstanding the position of the American Bar Association, the judges I have mentioned, and even Justice Rehnquist's statement on this matter, in the interest of seeing that this measure be passed, approved, and signed into law, I offer an amendment which would allow the court in its discretion to dismiss a case with or without prejudice. In determining whether it be with or without prejudice, the court may consider the following factors: The seriousness of the offense charged, the facts and circumstances of the case which led to dismissal, and the impact of reprosecution on the administration of this act, on the administration of justice. Therefore, the court in its discretion can allow a reprosecution if the ends of justice would be served, and they clearly outweigh the interests of the defendant to a speedy trial.

I believe this eliminates, in substance, the objection by the Department of Justice.

I refer to a letter submitted by the gentleman from Illinois (Mr. ANDERSON) last evening, a letter from William Saxbe, Attorney General, dated December 13, 1974. I quote from page 2:

> Adoption of this amendment—

Meaning a dismissal with or without prejudice—

> would resolve the most significant difficulty in this legislation and would enable the Department to effectively administer the provisions of H.R. 17409.

So for those factors I urge this Congress to adopt the amendment. In addition to that, the second amendment, Mr. DENNIS, simply provides that wherever a case is dismissed, the time limit shall start over again upon reprosecution. Now that we allow reprosecution under this amendment, if it is adopted, any dismissal would start the time period running from the very inception once again, so it is only technical in nature.

Mr. CONYERS. Mr. Chairman, will the gentleman yield?

Mr. COHEN. I yield to the gentleman from Michigan.

Mr. CONYERS. I thank the gentleman for yielding.

May I commend my colleague, the gentleman from Maine, on his explanation of the rationale that led the Committee to accept these two amendments. It was with a certain degree of reluctance. We know that with the American Bar Association standards and many within the ranks of the judiciary have made clear that they could live with "dismissal with prejudice," as that vehicle provides we could exert the will of the Congress on the courts in attempting to mandate speedy trials. But, in the interest of time, because of the lateness of the calendar year in which this measure comes up, and because of the Committee on the Judiciary's other activities, it is felt that because the Senate is awaiting this legislation, it would be far more prudent for all of us, regardless of our feelings about this amendment, to accede to it in the interests of enacting speedy trial legislation. I completely concur with both of the amendments and urge the Members to support them.

Mr. DENNIS. Mr. Chairman, will the gentleman yield?

Mr. COHEN. I yield to the gentleman from Indiana.

Mr. DENNIS. I thank the gentleman for yielding.

When we were talking before about the gentleman's amendment, I referred to the fact that certain matters were listed in his amendment that the court shall consider in determining whether to dismiss with or without prejudice. They shall consider these, among others.

The CHAIRMAN. The time of the gentleman has expired.

(By unanimous consent, at the request of Mr. DENNIS, Mr. COHEN was allowed to proceed for 2 additional minutes.)

Mr. DENNIS. If the gentleman will yield further, the seriousness of the case, the facts and circumstances of the case which led to the dismissal, and the impact of the reprosecution on the administration of justice—and it was suggested that there should be added in there the degree of prejudice to the defendant's ability to prepare his case.

Frankly, I will say to the gentleman I am of two minds whether to offer that as an amendment to the gentleman's amendment or not, but at least I would like to make some legislative history. Is it the gentleman's understanding—certainly it would be mine—whether the language "the degree of prejudice to the defendant's ability to prepare his case" is or is not written into the statute, that that would certainly be not only a proper but a very important factor which the court both could and should consider in determining whether the dismissal, if any, would be with or without prejudice.

Mr. COHEN. Let me say to my friend, and that is the reason I oppose the concept of that additional particular factor as part of the mandatory language, is the very fear I expressed earlier, that it simply would conform future conduct to present conduct, and it would allow a perpetuation of the system we have now. I certainly do not think it is necessary. I would agree with the gentleman that the court in determining whether or not to dismiss should consider whether or not the ends of justice might be served and would take this into account.

Mr. DENNIS. If the gentleman will yield to me further, I am sure the gentleman will agree with me that is one of the main factors in making this very determination.

Mr. COHEN. The fact that we do not exclude it would certainly permit it on a permissible basis.

Mr. DENNIS. Does the gentleman agree with me that it is one of the main facts the court does now take into consideration and would he further agree there is no intention in this bill to exclude it from inclusion in the future?

Mr. COHEN. The reason for dismissing it would be on technical reasons rather than a time limitation, for instance, defective indictments. If it is done for that reason, reprosecution is allowed under present practice.

The CHAIRMAN. The time of the gentleman from Maine has expired.

(On request of Mr. SMITH of New York and by unanimous consent, Mr. COHEN was allowed to proceed for 4 additional minutes.)

Mr. DENNIS. Mr. Chairman, I thank the gentleman from New York, and if the gentleman from Maine will yield further, I am not quite sure whether or not I got the answer I expected from my friend. What I am trying to get at is, I realize that in this bill we now have time limits and they require a dismissal, barring certain exceptions, with or without prejudice. Under this amendment the court has discretion and under this amendment certain factors are listed which the courts must consider. It does not list the degree of the prejudice to the defendant if they dismiss his case, which I would suggest is certainly an important factor, because if the defendant is not prejudiced there is certainly less reason for a dismissal without prejudice.*

All I am asking the gentleman is, although it is not written into his amendment, is it still appropriate and proper and in the gentleman's opinion the thing the court should do to give consideration to that principle or are we passing a bill where we exclude that and indicate we do not want it any more?

Mr. COHEN. I think I indicated to the gentleman that what I am concerned about is by listing this as a separate and independent factor, that the Justice Department will come in and say there is no prejudice to the defendant in this case. I think implicit on the court is the necessity to determine whether or not the ends of justice are being served and the impact upon reprosecution and he might well consider the prejudice to the defendant, if any, and he might take this into consideration. I think I am answering the gentleman's question.

Mr. CONYERS. Mr. Chairman, if the gentleman will yield, would that not logically accrue?

Mr. COHEN. The question the gentleman is raising is implicit. I think the answer is "Yes."

Mr. DENNIS. If I understand both the gentleman from Michigan and the gentleman from Maine, they are saying that among the circumstances of the case, which is the language in their amendment, the prejudice or lack of the prejudice to the defendant is one of those proposed circumstances to consider. Am I right?

Mr. COHEN. Yes.

Mr. DENNIS. Is that correct, I ask the gentleman from Maine?

Mr. COHEN. I believe that is essentially correct. What I am indicating is that we not consider it as a separate independent ground for the prosecution and open up to the Justice Department and the prosecutor to say we have not met the time limit and we did not take advantage of all other time exemptions, but there is no prejudice to the defendant. I do not think that would be a sufficient basis in the consideration of the other factors to determine if justice would be done.

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*So in original. Probably should be "with prejudice."

. . . .

[Mr. DENNIS.] Mr. Chairman, I take this time to ask the gentleman from Michigan (Mr. CONYERS) a question along the lines which have been discussed with the gentleman from Maine.

I have an amendment here in my hand which could be offered, but if we can make up some legislative history which would do the same thing, I am willing to do it.

Now, the amendment of the gentleman from Maine lists among the things the court will consider the seriousness of the offense and the fact of the circumstances of the case which led to the dismissal.

Now, in the judgment of the gentleman from Michigan, who is the author of the bill, is the phrase, "the facts and circumstances of the case which led to the dismissal" broad enough to include the degree of prejudice to the defendant's ability to prepare his case?

Mr. CONYERS. Mr. Chairman, if the gentleman will yield—

Mr. DENNIS. I am happy to yield.

Mr. CONYERS. I append these remarks on to the perfectly articulated resolution to this problem made by the gentleman from Maine. The answer is that that could and can be a factor that would be considered.

Therefore, I would urge that the gentleman find that satisfactory and not move his amendment, as he may be contemplating. The facts and circumstances of the case could include the degree to which the defendant might have been prejudiced. This does not alter, I say to my friend, the gentleman from Indiana (Mr. DENNIS) the fact that the expiration of the time limits subject to these conditions are a condition in and of themselves for a dismissal.

The point of the gentleman from Indiana is includable for consideration within the second condition of the amendment of the gentleman from Maine (Mr. COHEN).

The CHAIRMAN. The question is on the amendments offered by the gentleman from Maine (Mr. COHEN).

The amendments were agreed to.

Materials from the History of the 1979 Amendments

1979 House Committee Report 3

Failure to meet the time line of 30 days from arrest to indictment calls for a dismissal of the charges; the statute makes no mention of a requirement that the defendant move for such a dismissal, but, as a practical matter, such a motion will be necessary to bring the matter to the attention of the court in the pre-indictment phase of the proceedings.

1979 House Committee Report 8-9

The committee is of the opinion that some temporary suspension of the dismissal sanction is justified. In retrospect, once the decision was made to have a phase-in period prior to imposition of the dismissal sanction, it appears that the wiser approach would have been to provide some time during which the permanent time limits would be in effect without the dismissal sanction. The suspension will provide that result. While the act does permit dismissal without prejudice, extensive use of this procedure could undermine the effectiveness of the act and prejudice defendants, and the committee intends and expects that use of dismissal without prejudice will be the exception and not the rule.

18 U.S.C. §§ 3162(b), (c)

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

Derivation

Mikva bill, § 3162(a) (p. 282): "When a court has set a date certain for trial and on such date the defendant, his counsel, or both fail to proceed to trial without justification, the court may punish the responsible person for criminal contempt."

The original Ervin bill had no similar provision.

1972 Senate subcommittee bill, §§ 3162(b), (c) (pp. 301, 303). Subsection (b) was identical to the final version except that clause (1) referred to allowing "a date certain for trial to be set without disclosing the fact that a necessary witness would be unavailable for trial on such date," and clause (4) referred to willful failure to proceed to trial "on the date set for trial . . . ." Subsection (c) required the court to follow rule 42 of the Federal Rules of Criminal Procedure.

1974 Senate committee bill, §§ 3162(d), (e) (pp. 319, 320). No change.

1974 House subcommittee bill, §§ 3162(b), (c) (pp. 346, 347). Minor language changes in subsection (b).

1974 House committee bill, §§ 3162(b), (c) (pp. 346, 347). Substituted "procedures established in" for "Rule 42 of" in subsection (c).

No House floor amendments.

1974 act, §§ 3162(b), (c) (p. 379).

Not amended in 1979.

There were no similar provisions in the ABA standards.

Editor's note: Language in sections 3161(d)(2) and 3161(e), introduced by the 1979 amendments, makes the sanctions applicable to the time limits set forth in those provisions.

Materials Addressed to Mikva Bill

Letter to Representative Mikva from Frank J. Remington, Aug. 14, 1970, at 1971 Senate Hearings 191

The provision for revoking the defendant's pretrial release [in a draft revision of Fed. R. Crim. P. 45] is based on the assumption that right to bail is properly conditioned not only on appearance but readiness to proceed at any time reasonably fixed by the court. This seems to me sensible, though I have found no precise authority which would support this conclusion. The assumption, of course, is that the defendant in custody will have inducement to comply with reasonable time limits rather than to spend time in custody. The major current problem of prolonged delay exists in cases where the defendant is on pretrial release.

In theory it would be desirable to provide positive inducements rather than to rely so heavily upon negative sanctions. The difficulty is in thinking of positive inducements which are both effective and legally proper. Giving a defendant sentencing advantages would constitute an inducement, but some courts have held that this is an improper criterion upon which to base a sentencing decision. It has also been suggested that the right to enter a plea of guilty (and thus obtain sentencing concessions) terminates at a given time, thus creating an inducement to engage in plea negotiations promptly. This also presents some difficulties in implementation, however.

Letter to Representative Mikva from James R. Glover, Aug. 14, 1970, at 1971 Senate Hearings 192-93

Probably the strongest sanction which could be exercised for unreasonable delay of a criminal action is that of contempt. Your bill, H.R. 15888, provides for this sanction to be used against a defendant or defense counsel for failure "to proceed to trial without justification." The court might also be empowered to use this sanction for prosecution induced delay. At least one state, Montana, has done this. The Montana statutes require that the county attorney file an information within thirty days of the date of the preliminary hearing or waiver thereof. "If the county attorney fails to file the information within the time specified he may be found guilty of contempt, and may be prosecuted for neglect of duty." Mont. Rev. Code Ann. § 95-1302 (1969).

. . . .

Establishing sanctions for defense caused delay is more difficult than establishing sanctions for prosecution caused delay because of the possibility that the sanction would deprive the defendant of rights guaranteed by the Constitution. The contempt sanction does not appear to cause any difficulty. If the defendant or defense counsel fail to appear or to be ready to proceed with some stage of the criminal justice process on the date set by the trial court without good reason, the trial court should be able to find the responsible party in contempt and punish him accordingly without depriving the defendant of any of his constitutional rights.

The only other sanction for defense caused delay that I can think of is one which is mentioned in the amendment to rule 45 that I have been working on—if the court finds that the failure to comply with specified time limits is the fault of a defendant not in custody, the court may revoke his release. If the defendant's failure to meet an established time limit in a particular case indicates the strong possibility that the defendant will not appear for trial, the revocation of release does not appear to violate any of the defendant's constitutional rights. However, if the facts of the case do not make out the strong possibility that the defendant will not appear for trial, serious constitutional objections could arise.

Materials Addressed to Original Ervin Bill

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 5, between lines 21 and 22, insert the following:

> "(b)(1) In any case in which the court has set a date certain for trial and on such date the defendant, his counsel, or both, fail to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish the responsible person for criminal contempt.
>
> "(2) In any case in which defense counsel (A) has agreed on a date certain for trial with knowledge that a defense witness would be unavailable; (B) has filed a motion for the purpose of delay which is totally frivolous and without merit; or (C) has filed a sworn statement for a continuance which contains a false statement material to the granting of the continuance, the court may punish the defense counsel by—
>
> "(i) decreasing, by 25 per centum, his compensation pursuant to section 3006A of title 18, United States Code, if counsel is appointed;
>
> "(ii) a fine of not to exceed 25 per centum of his compensation if counsel is retained;
>
> "(iii) denying him the right to practice before that court for a period of three months; or
>
> "(iv) filing a report with an appropriate disciplinary committee.
>
> "(3) The authority to punish provided for by this subsection shall be in addition to any other authority or power available to the court.".

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34140-42 (Sept. 30, 1971)

Mr. President, S. 895 contains a sure and effective sanction against prosecution delay, but it provides no restraints on dilatory defense tactics. My amendment would plug this obvious hole in a way that will not infringe on the defendant's right, but will protect society against unreasonable delays by the defense.

. . . .

. . . The sanctions which are added to section 3162 will insure the cooperation of the defense. It would be unconscionable to provide a statutory speedy trial period with dismissal as the penalty for unreasonable prosecution delay and not provide an enforcement mechanism against unreasonable defense delays. The sanctions I have included are moderate measures which will not stifle legitimate defense tactics; they are aimed only at unreasonable delays.

Mr. President, we will undoubtedly hear arguments questioning the constitutionality of sanctions against dilatory defense tactics. First, it must be pointed out that only one of these sanctions are aimed at the defendant; most are directed at the tactics of the defense counsel which amount to unreasonable delays in the process of justice. Such delays obstruct justice and can be punished. Second, courts have always had the inherent power to discipline errant defendants and lawyers. This power in the Federal courts is codified in 18 U.S.C. 401 and authorizes the court to punish summarily three types of contempt by fine or imprisonment: first, misbehavior which obstructs the administration of justice, second, misbehavior of official acts of officers, and third, disobedience or resistance to its lawful writ, process, order, rule, decree, or command. This statute does not authorize unreasonable sentences and it does not escape the due process requirements of the Constitution such as trial by jury of serious offenses, *Bloom* v. *Illinois*, 391 U.S. 194 (1968) and trial by another judge where the questioned conduct is an emotional attack on the personal integrity of the judge, *Mayberry* v. *Pennsylvania*, 91 S. Ct. 499 (1971), but the power to punish for a variety of contemptuous conduct is clearly constitutional. The Supreme Court has held that sentences for criminal contempt of up to 6 months may constitutionally be imposed without a jury trial. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).

If Congress can empower the Federal courts to punish contempt by imprisonment, we can certainly authorize the punishment contained in this amendment—by conviction of contempt for a purposeful refusal to proceed with trial, by reducing compensation provided to the defense counsel, by denying access to the court for a short period, or by causing a report to be filed with the discipline committee of the local bar. The sanctions I have proposed are consistent with the recommendations of the ABA minimum standards for the prosecution function and the defense function—tentative draft.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 107

The second principal provision of S. 895, Mr. Chairman, is the one which requires, with certain exceptions, that a criminal prosecution not brought to trial within 60 days from the time of the filing of an information or indictment shall be dismissed with prejudice upon the motion of the defendant. Viewed from the point of view of the prosecutor, which of course is one of the functions of the Department of Justice in the federal criminal system, this provision is not only draconic, but quite one-sided in its sanctions. While prosecutors as a whole must undoubtedly bear their share of responsibility for the delay that sometimes appears to be endemic in our system of criminal justice, as a matter of fairness it does not seem that the drastic sanction of dismissal with prejudice should be visited upon the prosecution, without any corresponding sanction visited on the defendant. The apparent one-sidedness of the sanction is emphasized by the fact that, with due regard for the bill's exceptions and its exclusions of certain periods of time in computing the 60-day period, it is nonetheless entirely possible that a criminal prosecution could be dismissed without any fault on the part of the prosecution, simply because there were not adequate judges available to preside at the trial within the time limits specified in the bill. The result would be that a defendant held to answer for a serious crime would go scotfree—neither convicted nor acquitted.

Thus, viewed from the point of view of the prosecution, the mandatory dismissal with prejudice at the expiration of 60 days is a sanction which is both one-sided and severe.

Prepared Statement of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 113

I offer a last comment with respect to the second portion of the bill, Mr. Chairman. We believe that a small part—though by no means all—of the unevenness with which the sanctions fall on the two parties to a criminal case as the bill is now drafted could be ameliorated by further investigation of legally permissible sanctions that might be imposed upon criminal defendants or on their counsel who flout the rule relating to speedy trials. On this phase of the bill, too, the Department will be happy to be of such assistance as the Subcommittee may wish in developing such proposals.

Testimony of Assistant Attorney General William H. Rehnquist, 1971 Senate Hearings 116-17

[Senator ERVIN.] I am intrigued by your suggestion that there ought to be some amendment made to place some kind of limitation on the conduct of the counsel for the defense. I am somewhat at a loss as to what kind of restrictions could be put on them because they really don't have very much to do with the trial. The accused is there against his will and is tried any time that the prosecution insists on the trial and any time that the judge is willing to hear the case.

Mr. REHNQUIST. Well, Mr. Chairman, it may be that there is nothing that can be done along that line. Certainly nothing should be done that would in any way impair the effective representation of the defendant or place any undue burden on the defense. Nonetheless, I think it is generally recognized that there is one weapon that any criminal defense lawyer can use, within legitimate channels it is a good weapon, and that is delay. But I think if we are going to really clamp down on undue delays, I am just wondering, and I don't have any concrete suggestions to offer, whether there might not be some sanctions available for the defense lawyer who gets way out of line in protracting the date of trial just as there obviously are going to be sanctions for the prosecutions.*

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*So in original. Probably should be "prosecutors."

Testimony of Representative Abner J. Mikva, 1971 Senate Hearings 122

I do recognize Mr. Rehnquist's position, and I understand the vernacular he used is that the prosecution would be getting its lumps on this question of dismissal of a case if they weren't ready to try it in 60 days. In my bill I try to provide a few lumps for the defense if they are not ready; I think such provisions would pass constitutional muster.

Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 147

I would specify in the legislative history a range of incentives and sanctions which may be available, without further legislation, to encourage cooperation and deter delay by defense counsel and his client. In general, sanctions may prove less necessary under a system in which an atmosphere of timeliness prevails, and resource availability no longer makes delay tolerable. Moreover, professional responsibility standards are moving to curtail defense delay. Thus the American Bar Association Standards for Criminal Justice on *The Defense Function* (Standard 1, 2(c) and (d)) defines as "unprofessional conduct" the intentional use of procedural devices for delay, or the acceptance of employment for the purpose of delaying trial. Similar standards have been developed for *The Prosecution Function.* In addition, caseload limits may be imposed on attorneys who engage in dilatory practices; Criminal Justice Act appointments can be curtailed, or fees reduced; a system of "early or never" plea bargaining can be tried to preclude the acceptance of a plea to less than the full charge within a fixed period prior to the trial date; conditions of release can be reviewed for defendants suspected of intentional delay; or the case can be ordered to trial in the face of all delaying motions. In the long run, it will be the climate created by the district court which will determine the success of the rule.

Letter to Assistant Attorney General William H. Rehnquist from Senator Ervin, Sept. 15, 1971 Senate Hearings 183

As we agreed at the hearings, I hope that the Department can supply the Subcommittee with a legal memorandum on the constitutionality of imposing sanctions against dilatory counsel and defendants. Sanctions which have been suggested include:

(1) Criminal contempt for counsel or defendant.
(2) Reduction of appointed counsel's Criminal Justice Act compensation.
(3) Fines for retained counsel.
(4) Restriction of counsel's right to practice.
(5) Submission of conduct reports to a disciplinary committee.

You may also wish to express the Department's position on including any or all of these sanctions in the legislation or alternatively, on suggesting them in the legislative history.*

Letter to Senator Ervin from Peter J. Donnici, Sept. 30, 1970, at 1971 Senate Hearings 167

I am somewhat concerned about your statement as to sanctions "on unreasonably dilatory defendants and defense counsel". While a speedy trial is an essential component of due process, there is a real danger in bringing cases to trial "too speedily". I fear that the imposition of sanctions could operate to discourage or penalize attorneys for taking necessary time in preparation, discovery or presentation of pre-trial motions. The word "unreasonably" is not sufficiently precise in this context.

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*No response to this portion of Senator Ervin's inquiry has been found in the public record.

Letter to Senator Ervin from Thomas M. Cooley II, Oct. 1, 1970, at 1971 Senate Hearings 165

Unreasonable dilatory defendants and defense counsel raise a different issue. Where counsel alone is responsible for excessive delay, it would seem improper to punish his client. Where complicity on the client's part can be demonstrated new sanctions should be applied only when the normal controls available to the court are clearly ineffective. I am not sufficiently versed in the day-to-day workings of the Federal Courts to judge how often this may happen or what sanctions would be most effective without prejudicing essential rights.

Letter to Senator Ervin from Robert G. Polack, Oct. 8, 1970, at 1971 Senate Hearings 177

I think that the provisions of Section 3162 are much too lenient. It seems to me that if a defendant, through no fault of his own or of his counsel, is not brought to trial in the short period required by Section 3161, instead of setting him free to continue to prey upon the public there should be a punishment levied against the Judge or the U.S. Attorney responsible for the failure to bring him to trial.

. . . [I]t seems to me that if the defendant is not in custody there is less reason for applying the time limitations and sanctions in his favor than if he is in custody. Here, again, it seems to me that the statute should be directed toward some form of discipline against those charged with expediting trial instead of in favor of the defendant charged with the offense.

Letter to Senator Ervin from Bruce D. Beaudin, Oct. 15, 1970, at 1971 Senate Hearings 160

Our experience shows that sanctions imposed on dilatory defendants and defense counsel might well be appropriate. While I cannot at this time give you the precise numbers involved, there have been many cases where defense counsel has not appeared at a conditional re-evaluation hearing following a violation report to the court by the Bail Agency. There have also been many instances of defendants who are late. Whether or not the court will enforce sanctions on defense counsel is a question more properly left for the court. It seems to me, however, that something should be done.

Letter to Senator Ervin from Edward L. Barrett, Jr., Oct. 26, 1970, at 1971 Senate Hearings 159

Dean Barrett suggested that the court be authorized, if the defendant was found responsible for delay, to revoke bail or other release and return the defendant to custody. See the excerpt at p. 201 *supra.*

Letter to Senator Ervin from Laurence H. Tribe, Dec. 2, 1970, at 1971 Senate Hearings 201

Finally, it should be noted that Title I does not attempt to penalize counsel (or his client) for litigation tactics which rely upon dilatory continuances. A partial remedy exists in that a judge might deny a continuance either because it was not made upon a showing of "good cause," or because the ends of justice can be met without granting it. But while such tests may filter out some frivolous continuances, there is no penalty for the lawyer who attempts such tactics—unless the limited laws on obstruction of justice and the contempt power prove applicable. Frivolous motions for continuances may delay the trial, and some of them may be granted despite judicial scrutiny. In my judgment, that is simply the price we pay for a system which places a high but surely justifiable premium on the effective assistance of counsel and encourages his best efforts in his client's behalf. Any attempts to second-guess defense counsel, to penalize him subsequently for bad faith in making certain motions on his client's behalf, would deter counsel from using even acceptable tactics out of a fear that they may later be found unacceptable. Thus, I strongly approve the absence of any such sanctions in this statute.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 55

The commentary on this provision in the draft report was virtually identical to the commentary at pages 43-44 of the 1974 Senate committee report, set forth below (pp. 231-32).

Memorandum Explaining Differences Between S. 754 and S. 895, Accompanying Remarks of Senator Ervin on Introducing S. 754, 119 Cong. Rec. 3267 (Feb. 5, 1973)

[T]he Justice Department suggested that section 3162 of S. 895, be amended to authorize sanctions against defense counsel responsible for unwarranted delay. The Department argued that section 3162 effectively sanctioned the government for delay by providing for mandatory dismissal if trials were not commenced within the proscribed time limits and that in all fairness defense attorneys who cause unnecessary delay should be subject to some type of penalty. The provision is based upon language proposed by Senator Thurmond and in many respects is simply a codification of existing law.

Opening Statement of Senator Ervin, 1973 Senate Hearings 4

I recognize that outright dismissal is a harsh sanction but it is the only one that promises to be effective. If the Justice Department, or anyone else, can come up with an alternative means of enforcing these limits, I will welcome that suggestion.

Since a sanction against only one or two of the parties is not only unfair but makes for defective legislation S. 754 also has other sanctions on the defendant. These were offered by the Justice Department and Senator Thurmond as a means for ensuring that the defense also is under the gun on speedy trial.

To many, these sanctions may seem harsh. There are two answers to that complaint. First, it is now clear that no one will be motivated unless the penalty for delay is clearly stated. Second, I am confident that neither the courts or [*sic*] the prosecution will sit on their hands under the threat of dismissals.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 193

The following comments, although written after subcommittee approval of the bill, were apparently based on a draft submitted to the Justice Department beforehand:

Section 3162(b) gives the court additional control mechanisms for governing the conduct of attorneys, but it does not include sanctions for the defendant who engages in dilatory conduct. It is reasonable to conclude that a defendant who is free on bail is under no pressure to proceed to trial, and if the prospect of acquittal is remote, he will seek by all available means to postpone the day of trial. We would suggest, therefore, that the following provisions be included in Section 3162(b):

> "In any case in which the defendant, on bail, knowingly engages in conduct designed to delay the criminal proceedings or in any way impair the orderly trial processes, said defendant's bond shall be revoked, unless otherwise ordered by the court."

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 5

[T]he Justice Department suggested that section 3162 of S. 895 be amended to authorize sanctions against defense counsel responsible for unwarranted delay. The Department argued that section 3162 sanctioned government delay by providing for mandatory dismissal if trials were not commenced within the prescribed time limits and that to create a balanced bill, defense attorneys who cause unnecessary delay should be subject to some type of penalty. The provision is based upon language proposed by Senator Thurmond and in many respects is simply a codification of existing law. The Committee has also retained this provision in S. 754.

1974 Senate Committee Report 27

If either prosecutor or defense counsel is responsible for intentional delay, he may be subject to sanctions including fines, penalties and a withdrawal of the right to practice for as long as three months.

1974 Senate Committee Report 43-44

The sanction for the failure of defense counsel to comply with the time limits is a scheme of penalties for dilatory tactics. The latter half of section 3162 is based upon an amendment to S. 895 proposed in the last Congress by Senator

Thurmond. It sets out four situations when sanctions against counsel would be appropriate: (1) where counsel agrees to a trial date when he knows one of his witnesses will be absent; (2) where counsel files a motion which he knows is frivolous and without merit solely for the purpose of delay; (3) where counsel makes a false statement for the purpose of obtaining a continuance; and (4) where counsel otherwise fails to proceed to trial without justification consistent with section 3161. It sets out a range of penalties including the decreasing of compensation of appointed defense counsel, fines, the denial of the right to practice in that court for as long as three months, and the filing of a report with the appropriate disciplinary committee. The new provision also requires the court to follow rule 42 of the Federal Rules of Criminal Procedure in conducting procedures which lead to such penalties.

"Miscellaneous Amendments," Enclosure to Letter to Representative Conyers from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Oct. 1, 1974, at 1974 House Hearings 756

(1) That line 7 on page 2 of the bill be amended to read as follows: ". . . . the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar."

Reason.—Setting a case for trial on a "day certain," except for unusual situations, is contrary to all rules of good judicial administration. Cases normally should be calendared for trial and reached in order on the calendar.

. . . .

(3) Page 10, line 3. Amend this line to read as follows: "[T]he case to be set for trial without disclosing the. . . ."

(4) Page 10, line 5. Strike the words "on such date."

(5) Page 10, line 10. Strike the words "on the date set for trial."*

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 23

Sanctions are also provided for attorneys, either for the defense or the Government, who intentionally delay the proceedings. The penalties include a reduction in compensation or a fine, or suspension from practice before the court for up to 90 days.

1974 House Committee Report 36

[I]f the attorney for the Government is responsible for unreasonable delay either in causing a detainer to be filed with the custodial official or seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand for trial, any such period of delay should be counted in ascertaining whether the time for trial has run in connection with the defendant's demand for dismissal under section 3161(a)(2).† In addition, the Committee feels that, since the prejudice an incarcerated defendant may suffer is potentially so great, the attorney for the Government is also subject to sanction for such unreasonable delay under section 3162(b)(4). The Committee does not believe that this imposes any hardship upon the attorney for the Government since, unlike state practice in many jurisdictions where the period in which the prisoner must be tried begins upon receipt of the demand for trial, the time limits do not apply until the defendant is actually present for purposes of pleading.

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*The ellipses and brackets within the quotation marks are in the original.

†So in original. Probably should refer to section 3162(a)(2).

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777

Mr. WIGGINS. Mr. Chairman, the final question is this:

Are there provisions for extending the rigid time limits? Is it absolutely clear that if such a defendant or his counsel should deliberately stall the proceedings that that period of delay occasioned by such efforts would not be counted in computing time?

Mr. COHEN. The gentleman from California is correct in that regard. Any action taken by defendants to deliberately stall a case, and as I indicated before, in 90 percent or perhaps an even higher percentage of cases, the delay works to the advantage of the defendant, and the gentleman from California, as an outstanding defense counsel, I am sure knows that that is the case.

The purpose, intent, and thrust of this act is to put pressure not only on the court and prosecutor, but on the defense counsel to eliminate delay. My understanding is that any delay that is caused by defense counsel would not be included as part of that. He could not take advantage of deliberately stalling, and then seek a dismissal under that rule. I believe the gentleman from Michigan would agree with that.

Mr. WIGGINS. Does the gentleman from Michigan agree with that observation?

Mr. CONYERS. I thank the gentleman for yielding. I would point out that under 3162 there is a legislative sanction imposing penalties upon attorneys who would act in the way the gentleman from California suggests. So, we are very definitely trying to make certain that the defendant or his counsel will not, through the method that the gentleman suggests—through deliberately stalling—take advantage of the exclusions. The court still has available to it all of its usual procedures for punishment of the counsel, but they have additional sanctions within the legislation itself.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41778

[Mr. BURLISON of Missouri.] Now, as I understand the legislation, dilatory tactics on the part of defense counsel results in tolling the statutory time period set out. I am not so sure that that really changes much from what the law is now. My question, is there anything in this legislation to put any restrictions on dilatory tactics of defense counsel?

Mr. COHEN. Mr. Chairman, I appreciate the inquiry of the gentleman, I refer the gentleman to page 13 of the bill whereby a court can impose a fine on counsel who engage in dilatory tactics not to exceed $250. They can also refer them to the ethics committee of the Bar Association, which is designed to discourage that.

18 U.S.C. §§ 3163(a), (b)

(a) The time limitation in section 3161(b) of this chapter—

(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

(b) The time limitation in section 3161(c) of this chapter—

(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

Derivation

Mikva bill, § 3163(b) (p. 283). Provided that the time limit to trial would apply to offenses charged in informations or indictments filed more than 18 months after enactment.

Original Ervin bill, § 3163(b) (p. 292). Substantially similar, but referred to "eighteen months after the effective date of this chapter." There was no provision designating such an effective date.

1972 Senate subcommittee bill, § 3163 (p. 303). Provided that the time limit would apply to offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following enactment, and would commence to run on that date as to all offenses charged in informations or indictments filed prior to that date.

1974 Senate committee bill, §§ 3163(a), (b) (pp. 320, 321). Added section 3163(a), dealing with the effective date of the separate time limit to indictment, a time limit that first appeared in this bill; it was in its final form, except that it referred to the twelve-calendar-month period following the date of enactment, rather than to the period following July 1, 1975. Section 3161(b), dealing with the time limit to trial, was virtually identical to the subcommittee bill.

1974 House subcommittee and committee bills, §§ 3163(a), (b) (pp. 347, 348). No change.

Amended on House floor, 120 Cong. Rec. 41790, to make the computation run from July 1, 1975, instead of the date of enactment.

1974 act, §§ 3163(a), (b) (p. 379).

Not amended in 1979.

There was no effective date provision in the ABA standards.

Editor's note: See also the history of the "transitional" time limits, sections 3161(f) and (g), and the special time limits for defendants in custody and "high risk" defendants, section 3164. Provisions in the Mikva and original Ervin bills establishing earlier effective dates for defendants in custody and those charged with certain crimes are treated herein as part of the history of section 3164.

Materials Addressed to Original Ervin Bill

Testimony of Senator Charles H. Percy, 1971 Senate Hearings 69

I would suggest that, if enacted, the provisions of this bill be made retroactive, so that those currently incarcerated and awaiting trial could assert their right to a speedy trial if they so desired. It is anticipated, of course, that special provisions of the bill would have to be drawn to permit the retroactive application of this right in as fair and efficient a manner as possible.

"Additional Amendments to S. 895," Appendix A to Prepared Statement of Daniel J. Freed, 1971 Senate Hearings 148

On page 6, lines 1-2:

The language "effective date of this chapter," which appears here and elsewhere, should be defined. The definition probably should set the effective date at a point *after* the Judicial Conference can act under § 3164(c) (e.g. 15 months after the date of enactment) with respect to all time limits in all districts. As an exception to such a delayed effective date, the definition might provide a special time limit applicable to persons held in detention prior to completion of the planning process described in § 3164.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 263

§ 3165. Effective date

The provisions in sections 3161 through 3164 shall be effective one year after the enactment date of this chapter.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 260

[O]ur new section 3165 provides that the time limits of our section 3161 (*i.e.*, the 180-day provisions) shall become effective as to all federal criminal offenses *at the same time.* This recommendation avoids the complex scheme set out in the effective date provision of S. 895. We have chosen a date one year after the enactment of the bill.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 55

This section makes the effective date of the time limits established in section 3161 one year after enactment. As to charges pending on the effective date, the time limits would begin to run at the effective date and not on the date of arrest or service of summons as provided in section 3161. This section must be read with section 3161(b), which provides that for the first year after the effective date trials are to be held within 180 days, the second year 120 days and the third year and thereafter 60 days.

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 167

The following text was suggested in connection with amendments whose principal purpose was to provide separate pre- and post-indictment time limits:

> (a) The time limitation in section 3161(b) of this chapter—
>
> (1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1973, in connection with the commission of an offense; and
>
> (2) shall commence to run on such date of expiration as to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.
>
> (b) The time limitation in section 3161(c) of this chapter—
>
> (1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1973; and
>
> (2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 44

Section 3163, when read with subsections 3161(b) and (c) and subsections 3161(f) and (g) implements the phasing-in of the time limits. The result is a seven year graduated phase-in of the time limits during which the time limits between arrest and trial are shortened and the sanction for failure to meet the time limits become [*sic*] more severe. (See Calendar of Implementation, Chart 1, p. 55.)

Along with implementing the phase-in of the time limits, this section also specifies which kinds of pending cases will fall under the time limits after enactment. The arrest to indictment time limit would apply to all cases brought on or following the effective date of the Act and also to all summons issued or arrests conducted prior to the effective date but for which no indictment or information has yet been filed. The indictment to trial time limit would apply to all cases brought on or following the effective date and to all indictments or informations filed prior to the effective date.

The effective date of the Act will be one year after enactment. During the year between the date of enactment and the effective date, the interim time limits discussed in Section 3164 will apply.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 40

The following language appeared in commentary on section 3165(e):

> The words "calendar month period following enactment of this Act" shall be construed to mean the first full month following the month in which the bill is enacted. For example, should this bill be enacted on December 10, the first calendar month would be measured from January 1.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Ray Thornton, 1974 House Floor Debate, 120 Cong. Rec. 41790

Representative Thornton offered amendments to change the computation date in sections 3163 and 3164 from the date of enactment to July 1, 1975. These were considered and adopted en bloc without any discussion. In offering similar amendments to sections 3165 and 3168, Representative Thornton had said that the change was proposed "in order to tie the effective date of the act to the necessary appropriations to implement the act." 120 Cong. Rec. 41789. The change had been supported by Representative Conyers, and accepted without debate.

18 U.S.C. § 3163(c)

(c) Subject to the provisions of section 3174(c), section 3162 of this chapter shall become effective and apply to all cases commenced by arrest or summons, and all informations or indictments filed, on or after July 1, 1980.

Derivation

First appeared in 1974 Senate committee bill, §§ 3162(c), 3163(c) (pp. 318, 321). Prior bills did not include an effective date for the sanctions; the sanctions were presumably to apply to all cases subject to the time limits. In the 1974 Senate committee bill, section 3163(c) provided that the sanctions would become effective "after the date of expiration of the fourth twelve-calendar-month period" following enactment. Section 3162(c) provided that, for two years thereafter, prosecutions could be reinstituted subsequent to speedy trial dismissals without the finding of exceptional circumstances that was required by section 3162(b).

1974 House subcommittee bill, § 3163(c) (p. 348). Retained the provision that sanctions would become effective "after the date of expiration of the fourth twelve-calendar-month period" following enactment. Eliminated the special provision for reinstituted prosecutions, which were not allowed under the subcommittee bill.

1974 House committee bill, § 3163(c) (p. 348). No change.

Amended on House floor, 120 Cong. Rec. 41790, to make the computation run from July 1, 1975, instead of the date of enactment.

1974 act, § 3163(c) (p. 379).

Reenacted, with amendments, in 1979. The effective date was deferred until July 1, 1980, and the applicability of the sanctions to cases pending on the effective date was clarified. The language of the revised subsection is from the Senate provision except that the Senate bill provided for a 1981 effective date.

There was no effective-date provision in the ABA standards.

Materials Addressed to 1972 Senate Subcommittee Bill

Possible Amendments to S. 754, in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 167-68

Senator McClellan offered two amendments in the alternative that were concerned with the dismissal sanction. One would have eliminated the dismissal sanction. The other would have amended the sanction provision by changing subsection (a) to (a)(1) and adding the following new paragraph:

> (2) The provisions of paragraph (1) of this subsection shall take effect upon the expiration of the first twelve-calendar month period following the date of the enactment of the Speedy Trial Act of 1973 during which the sixty day requirement provided for under section 3161(b)(1)(A) of this chapter was in effect for such entire period.

"Memorandum of Explanation, Possible Amendments to S. 754," in Statement Submitted for the Record by Senator John L. McClellan, 1973 Senate Hearings 164-65

Under S. 754, as now drafted, a violation of the sixty day rule would lead to dismissal [§ 3162(a)].*

This amendment is drafted in alternative versions.

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*Brackets in original.

The first would eliminate the sanction of dismissal.

The second would postpone the effective date of the sanction until the end of the first full year of the implementation of the sixty day rule.

It can be argued that the dismissal sanction is assessed against society while the fault of delay is attributable to the defendant, his counsel, the prosecutor or the court. Delay under the Sixth Amendment must normally be accompanied by prejudice relating to the ability of the defendant fairly to defend his innocence. Consequently, the use of a dismissal sanction there is distinguishable. In any case, the sanction should not be applied until the provisions of the bill have been fully implemented. Assuming it is determined that the time limits cannot be met, it should not be necessary to have prosecutions aborted, while Congress rushes to change the provisions of the bill. Under either alternative of this amendment, Congress will be given an opportunity to study the operation of the bill before moving in with the ultimate sanction.

Discussion of Proposed Amendments in Statement Submitted for the Record by Daniel J. Freed, 1973 Senate Hearings 154, 157-58

Progressive sanctions.—A sequential system, to replace Section 3162(a), of graduated sanctions for noncompliance with the statutory time limits. These would defer the ultimate sanction—dismissal with prejudice—for several years in favor of a series of less severe, but highly informative, incentives and pressures for prompt disposition. They include (i) release from pretrial custody (as in the present text of S. 754); (ii) detailed reports with reasons whenever a statutory time limit is to be exceeded; (iii) dismissal without prejudice, subject to reinstatement by leave of court upon a proper showing by the prosecutor (as suggested by Professor Oaks in his April 12, 1973 statement); and (iv) dismissal with prejudice as the final stage, by which time the system will presumably have learned and been funded to accomplish compliance with the statutory limits.

. . . .

Amendment #1 proposes (a) that the ultimate time limits in the statute be accomplished by reducing lengthier permissible limits at the outset, in stages, over a period of seven years; and (b) that gradually increased pressures for compliance with each particular set of limits be imposed during the early years. Amendment #2 proposes that the single time limit in Section 3161 of S. 754—covering arrest or indictment until trial—be replaced by three separate limits: (a) arrest to indictment, (b) indictment to trial and (c) conviction to sentence.

Specifically, under these amendments, the initial and ultimate time limits would be as follows:

I(i). They would not be operative at all during the first year after enactment, under the effective date provision in Section 3163, except for the interim limits defined in Section 3164, which would remain unchanged.

I(ii). They would prescribe for the period from *arrest to indictment*
- (a) 60 days in year 2.
- (b) 45 days in years 3 and 4.
- (c) 30 days beginning in year 5.

I(iii). They would prescribe for the period from *indictment to trial*
- (a) 180 days in year 2.
- (b) 120 days in years 3 and 4.
- (c) 60 days beginning in year 5.

I(iv). They would prescribe for the period from *conviction to sentencing*
- (a) 45 days in year 2.

(b) 30 days in years 3 and 4.

(c) 21 days beginning in year 5.

Further, under amendment #1 the consequences of failure to meet the time limits in outline I would be escalated as follows:

II(i). During the first year after enactment, the only applicable provision would be Section 3164, which prescribes interim limits for persons in detention awaiting trial and for released persons designated as high risk by the prosecutor. This section would continue in effect until the end of the sixth year.

II(ii). During the second year, failure to meet the limits specified in I(ii)(a), I(iii)(a) and I(iv)(a) would carry a reporting obligation under amendment 5 below, rather than dismissal as presently provided in Section 3162(a).

II(iii). During the third and fourth years, failure to comply with the limits in I(ii)(b) and I(iii)(b) would carry a reporting obligation and, in addition, beginning in year 4, the sanction of a dismissal without prejudice [the terms of which are explained below].* Failure to comply with I(iv)(b), which relates to sentencing, would carry reporting obligations only.

II(iv). Beginning in the fifth year, the final limits prescribed in I(ii)(c), I(iii)(c) and I(iv)(c) would take effect. From then on, each failure to comply with a limit would carry a reporting obligation (Amt. #5). In addition, for I(ii)(c) and I(iii)(c) noncompliance,

> in years 5 and 6, the sanction of dismissal without prejudice would be applicable; and
>
> beginning in year 7, dismissal with prejudice would become the sanction.

To summarize the timetable of amendments #1 and #2:

Reporting requirements become mandatory beginning in year 2 for each failure to comply with whichever time limit is applicable to indictment, trial or sentence under outline I.

Dismissal without prejudice becomes a sanction beginning in year 4 for failure to comply with the applicable limit under outline I for returning an indictment or commencing the trial.

Dismissal with prejudice becomes the ultimate sanction for either of these failures beginning in year 7, i.e., for failure to return the indictment within 30 days or to commence the trial within 60 days thereafter.

The dismissal without prejudice, operative in years 4, 5 and 6, is intended to place a heavy, but sustainable, burden on the prosecutor to justify failure to meet the limits by showing (a) exceptional circumstances which could not have been foreseen or avoided, and (b) lack of prejudice to the accused from the delay. Both the prosecutor in requesting reinstatement of the case, and the court in granting it, must set forth the reasons in writing. I understand that the Subcommittee staff, in cooperation with Senator McClellan's office, has drafted amending language for S. 754 to accomplish a similar result.

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*Brackets in original.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 27

This section, when read with subsections 3161(b) and (c),* implements the phasing-in of the time limits. The result is a seven year graduated phase-in of the time limits during which the time limits between arrest and trial are shortened and the sanction for failure to meet the time limits becomes more severe.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 40

The following language appeared in commentary on section 3165(e):

> The words "calendar month period following enactment of this Act" shall be construed to mean the first full month following the month in which the bill is enacted. For example, should this bill be enacted on December 10, the first calendar month would be measured from January 1.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Ray Thornton, 1974 House Floor Debate, 120 Cong. Rec. 41790

Representative Thornton offered amendments to change the computation date in sections 3163 and 3164 from the date of enactment to July 1, 1975. These were considered and adopted en bloc without any discussion. In offering similar amendments to sections 3165 and 3168, Representative Thornton had said that the change was proposed "in order to tie the effective date of the act to the necessary appropriations to implement the act." 120 Cong. Rec. 41789. The change had been supported by Representative Conyers, and accepted without debate.

Materials from the History of the 1979 Amendments

Memorandum from U.S. Attorney Virginia Dill McCarty to Assistant Attorney General Patricia M. Wald, Jan. 30, 1978,† at 1979 Senate Hearings 40

The Act clearly spells out the effect of the interim sanctions as they become applicable to pending cases. The Act is silent as to the effect of the July 1, 1979, sanctions on cases pending prior to July 1, 1979. In our District, where we are phasing in the Speedy Trial Act, compliance difficulties will abound. In order to be sure that no defendants are walking the streets free when they should be in jail, we will have to assume that the sanctions will apply to cases pending prior to that date, which may not be what Congress intended.

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*So in original. Reference should probably be to subsections 3161(f) and (g).

†So in original. Probably should be 1979.

1979 Senate Committee Report 35

Section 6 would amend § 3163(c) to defer the imposition of the dismissal sanction until July 1, 1981, and the Committee intends that the sanction applies only to all cases commenced by arrest or summons and all informations or indictments filed thereafter.

1979 House Committee Report 1

The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

1. By suspending, until July 1, 1980, the sanction of dismissal for failure to meet the time limits of section 3161(b) and (c). Provision is made for earlier reinstitution of the dismissal sanction in districts prepared to do so; . . . .

1979 House Committee Report 12

Section 6 would amend section 3163(c) to defer the dismissal sanction of section 3162 until July 1, 1980, and to specify that, except in those districts whose applications for earlier reinstitution of the dismissal sanction are approved under section 3174(c)(2), the dismissal sanction shall, beginning July 1, 1980, apply only to cases commenced by arrest or summons and to indictments or informations filed on or after that date.

Remarks of Senator Joseph R. Biden, Jr., Final 1979 Senate Floor Debate, 125 Cong. Rec. S11040 (daily ed. July 31, 1979)

A question has arisen regarding the impact on cases pending during the delay between the July 1, 1979 effective date of the dismissal sanctions in the 1974 act and the effective date of the Speedy Trial Act Amendments of 1979. I believe the legislation is clear in providing that if the 30-day time period (plus excludable time, if any) has begun but is not exceeded during the delay between July 1 and the effective date of the act, the dismissal sanction does not apply—even if the 30 day limit is exceeded after the effective date of the act.

Remarks of Senator Edward M. Kennedy, Final 1979 Senate Floor Debate, 125 Cong. Rec. S11040 (daily ed. July 31, 1979)

We must act expeditiously to insure that these amendments become law, as soon as possible. Further delay is likely to result in the dismissal of persons arrested on or after July 1, 1979.

18 U.S.C. § 3164

§ 3164. Persons detained or designated as being of high risk

(a) The trial or other disposition of cases involving—

(1) a detained person who is being held in detention solely because he is awaiting trial, and

(2) a released person who is awaiting trial and has been designated by the attorney for the Government as being of high risk,

shall be accorded priority.

(b) The trial of any person described in subsection (a)(1) or (a)(2) of this section shall commence not later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitation specified in this section.

(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

Derivation

Mikva bill, § 3163(a) (p. 283). This subsection provided that the time limit to trial from arrest, issuance of summons, or indictment would become effective one year earlier for defendants charged with crimes of violence and those "continuously held in custody" than for other defendants.

Original Ervin bill, § 3163(a) (p. 290). Provided earlier effective dates for three classes of defendants charged in informations or indictments: those charged with certain listed offenses and continuously held in custody; those charged with the same offenses and not continuously held in custody; and those charged with other offenses and continuously held in custody.

1972 Senate subcommittee bill, § 3164 (p. 303). This bill introduced a provision captioned "Interim limits," which was to apply during an interim period commencing 90 days following enactment of the Speedy Trial Act and ending on the day preceding the effective date of the permanent time limits. Each district court, and the Superior Court for the District of Columbia, were to "place into operation an interim plan to assure priority in the trial or other disposition of cases involving—(1) detained persons who are being held in detention solely because they are awaiting trial, and (2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk." Trial was to commence no later than 90 days from the beginning of continuous detention or designation as high risk. If the defendant was detained or designated as high risk on or before the first day of the interim period, trial was to commence no later than 90 days following that date. The provision was silent about the applicability of the exclusions provided in section 3161(h). Subsection (c), providing remedies for failure to comply with the interim time limits, was in its final form.

1974 Senate committee bill, § 3164 (p. 321). Minor language changes.

1974 House subcommittee bill, § 3164 (p. 348). Minor language change.

1974 House committee bill, § 3164 (p. 348). Eliminated the reference to the Superior Court for the District of Columbia.

Amended on House floor, 120 Cong. Rec. 41790, to make the effective date of the interim plan 90 days following July 1, 1975.

1974 act, § 3164 (p. 379).

Amended in 1979 to make the 90-day time limit permanent. The House accepted the Senate provision without change. The caption of the section was changed and subsections (a) and (b) were reenacted with amendments. Language relating to the interim character of the time limit was eliminated in the reenactment, as was language governing the provision's applicability to defendants whose cases were pending on its effective date. The last sentence of subsection (b) was added, clarifying the applicability of the exclusions of section 3161(h).

ABA standard 1.1(b) stated that the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks should be given preference over other criminal cases. ABA standard 4.2 stated that, if a shorter time limit is applicable to defendants held in custody than to others, the remedy for exceeding the special time limit should be release of the defendant on his own recognizance.

Materials Addressed to Original Ervin Bill

Testimony of Senator Charles H. Percy, 1971 Senate Hearings 69

I would suggest that, if enacted, the provisions of this bill be made retroactive, so that those currently incarcerated and awaiting trial could assert their right to a speedy trial if they so desired. It is anticipated, of course, that special provisions of the bill would have to be drawn to permit the retroactive application of this right in as fair and efficient a manner as possible.

Testimony of Daniel J. Freed, 1971 Senate Hearings 139-41

Senator **Ervin**. If I construe your statement correctly, you entertain the opinion that the provisions of the bill specifying these mandatory time limits, subject to the power of exclusion, should be retained?

Mr. **Freed**. That is correct, sir.

Senator **Ervin**. In other words, you feel that the provisions which require the preparation and the approval of the plan for each district plus the provisions which authorize a suspension of implementation in the event a particular district is unable to meet the time limits, give the bill sufficient flexibility to prevent jeopardizing the public interest?

Mr. **Freed**. I do agree with that, Mr. Chairman. The only reason I discussed that point in my statement is my belief that the provision that begins on the bottom of page 7 and runs to the top of page 8* requires the time limits to commence within 90 days of enactment. This would be prior to the time when the full planning mechanism and the opportunity to suspend the limits could run its course.

Senator **Ervin**. The amendment would show when that time limit would start out?

Mr. **Freed**. That is right. Perhaps because the term "effective date of this chapter" is not defined, you want to specify that the effective date of this chapter is 18 months after enactment, so that every district would have the opportunity to say how or whether it can meet the limits.

Senator **Ervin**. In other words, that would clarify any ambiguity and make the 18 month period one limitation. In addition there would be the ability to suspend the time limits in a case where there is need and so forth?

Mr. **Freed**. I agree with that, Mr. Chairman, with one possible exception which the committee might consider. That is that if you have a delayed effective date of 18 months, and a provision for further suspension, that may not address itself at all to the person who today is detained pending trial for 6 months, a year or 2 years. The committee might consider, simply as an introductory measure, imposing some kind of time limit, or scaled down system of time limits as Mr. Baskir suggested, for persons, who are detained pending trial.

Eventually there ought to be no differences because the problem of the person who is detained pending trial and the public's concern with persons who are dangerous and are released pending trial, are both high priority problems. But it may be that some of the high priorities could be put into an interim provision so that the phenomenon of persons waiting endlessly for trial in jail will not go on for another 2 or 3 years before this statute becomes effective.

Senator **Ervin**. Any questions?

Mr. **Baskir**. Mr. Chairman, I think that the portion of the bill which was intended to go into effect at that 90 day period after enactment was aimed at one class of persons, that is, those people who fall within the category of being dangerous or violent and who are actually detained. And that speedy trial rule was for a class of persons covered by the preventive detention bill as submitted by the Department for the nation and as enacted in the District of Columbia. It was designed to implement the provision in that bill which was enacted to require speedy trial for persons detained under the preventive detention law. That is why that provision was to take effect before the plan part for other defendants.

Mr. **Freed**. Well, in light of the fact that hopefully we will not have a Federal detention law, perhaps you could substitute for the provision here, a provision for expediting cases of detained defendants plus those of released defendants who are designated by the U.S. Attorney as being of grave concern to the prosecution.

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*So in original. Apparently refers to pages 5 and 6.

Again, I think it is important that the provisions of this bill equally take into account the supposedly dangerous person who is released and the accused who is in jail. It seems to me a provision like that might begin to make the provisions of this statute operative well in advance of the effective date of the entire mechanism.

. . . .

Senator ERVIN. I would appreciate it very much if you would furnish us with a proposed draft of the changes you suggest on page 8. It would be very helpful to us.

Mr. FREED. I would be very happy to do that, sir.

Comments on S. 895 in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 251

[W]e believe that the provision for mandatory dismissal of cases not disposed of within 60 days posits a period of time which is unrealistically short. Whatever might be the case if the Congress were to provide sufficient resources and facilities to the criminal justice system to allow the attainment of a 60-day goal, we think that such a period is presently more of a desirable goal than a realistically attainable achievement. We cannot with any reasonable degree of accuracy even project the needs for manpower, resources and facilities which would have to be provided to comply with the 60-day time limit within the nationwide scope of the federal criminal justice system. A recent attempt to impose a 60-day time limit on the Florida criminal justice system has led to unacceptable and, what is more important, unjust results. Therefore, we propose that a 180-day provision is adopted instead of the 60-day time limit. Concurrently we would provide that persons who are continuously incarcerated prior to trial be either tried within 90 days or else be conditionally released from pretrial custody.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 261

[§ 3161](d) If the trial of a defendant charged with a noncapital offense under the United States Code and held in confinement continuously since the date of his arrest on the charge contained in the information or indictment has not commenced within 90 days from the date of arraignment, subject to the provisions of section 3162 [exclusions and exceptions], the defendant shall be released upon bond or his own recognizance or upon such other conditions as the district court may determine. The trial of a defendant released under this subsection shall be commenced as provided in subsection (c) of this section.*

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*Subsection (c) in the department's proposal provided for a time limit of 180 days from arraignment to trial.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 257

Section 3161(d) provides for even more accelerated trials for persons in pretrial confinement, but not charged with capital offenses. This provision is substantially adapted from the Second Circuit Rules. If the trial of such a defendant cannot be commenced within 90 days from the arraignment, the section provides that the defendant must be released, whether upon bond, his own recognizance or upon such conditions as the district court shall determine. In that case the defendant must then be brought to trial within the 180-day period from the date of arraignment. The phrase "held in confinement continuously" is intended to preclude application of this section to persons rearrested for violations of the conditions of their release or held intermittently in community-based facilities.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 178

The distinction of the bill between defendants who are in custody and those out on bond is excellent. The requirements of a speedy trial, rather obviously, become more meaningful and necessary for the defendant who is incarcerated.

Letter to Senator Ervin from Terence F. MacCarthy, Nov. 16, 1970, at 1971 Senate Hearings 178

To the extent Section 3163(a)(1) itemizes specific offenses it might prove a bit confusing. Could not the section merely refer to all felonies except those specifically noted—i.e., anti-trust, securities or tax law cases.

Editor's Note

Material related to a suggested provision about computation of periods of time is reproduced as part of the history of section 3172.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 56

This section would require jurisdictions to implement interim plans within 3 months of enactment to remain in effect until the effective date of the 60-day time limits 3 years after enactment. (See Calendar of Implementation Chart A, p. —.) These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the U.S. attorney be tried within 90 days. The sanction for failure to try detained defendants within 90 days would be release, and "high risk" defendants would have their release conditions automatically reviewed.

Section 3164 has been added to title I of the legislation pursuant to a suggestion by Professor Dan Freed that certain minimal speedy trial requirements be placed into operation soon after enactment and until the courts are prepared to implement 60-day trials. This new section requires jurisdictions to implement interim plans within 90 days of enactment to remain in effect until the effective date of the 60-day provision in section 3161, which would be 3 years after enactment. These interim plans would be similar to the plan adopted by the U.S. Court of Appeals for the Second Circuit. (See Section IV. Discussion, p. —.) The section would require trials within 90 days for pretrial detainees or "high risk" defendants who are on pretrial release pending the full effectiveness of section 3161 and 3162. The sanctions for failure to adhere to the limits would not be dismissal with prejudice, as in section 3162, but pretrial release in the case of detainees and review of release conditions in the case of high risk releasees. The provision would not apply to detainees who have already been convicted of another offense because independent grounds for their detention exist.

Letter to Senator Ervin from Deputy Attorney General Ralph E. Erickson, Dec. 14, 1972, at 1973 Senate Hearings 193

The following comments, although written after subcommittee approval of the bill, were apparently based on a draft submitted to the Justice Department beforehand:

Proposed Section 3164 assigns a higher priority to the trial of jail and high-risk cases during the interim period and provides for the release of any defendant who is incarcerated if his trial is not commenced within the ninety days. This result would obtain even if the delay was not in any way attributable to the Government. This section of the bill would appear to modify the provisions of the Bail Reform Act of 1966 (18 U.S.C. §3146 et seq.) and Rule 46 of the Federal Rules of Criminal Procedure which condition release upon factors which will reasonably assure the presence of the accused at trial. It should be made clear in §3164 that the defendant need not be released under terms which will not reasonably assure his appearance at trial.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 5

[T]he Subcommittee in its October 1972 revision of S. 895 added a new section 3164 which would provide that beginning three months after enactment and continuing until the 60-day provision would have been effective 3 years after enactment, detained defendants be tried within 90 days or be released from pretrial detention until trial. There was consensus among the witnesses that although immediate implementation of 60-day trials was impractical, it was important and would be feasible to provide speedy trials for detained defendants. This change is based in part upon a similar provision adopted by the United States Court of Appeals for the Second Circuit. The Committee has retained this provision of S. 754.

1974 Senate Committee Report 27

This section would require jurisdictions to implement interim time limits within three months of enactment, to remain in effect until the effective date of the time limits of subsections 3161(b) and (c). . . . These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be tried within 90 days. The sanction for failure to try detained defendants within 90 days would be release, and "high risk" defendants would have their release conditions automatically reviewed.

1974 Senate Committee Report 44-45

Section 3164 would require jurisdictions to implement interim plans within three months of enactment to remain in effect until the effective date of the 90-day time limits of subsection 3161 (b) and (c). (See Calendar of Implementation, Chart 1, p. 55.) These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be tried within 90 days.

Section 3164 has been added to title I of the legislation as a result of the suggestion by Professor Freed that certain minimal speedy trial requirements be placed into operation soon after enactment and until the courts are prepared to implement the mandatory time limits. These interim plans would be similar to the plan adopted by the United States Court of Appeals for the Second Circuit. (See Section IV. Discussion, pp. 17-20.) The section would require trials within 90 days for pretrial detainees or "high risk" defendants who are on pretrial release, pending the full effectiveness of sections 3161 and 3162. The sanctions for failure to adhere to the limits would not be dismissal, as in section 3162, but pretrial release in the case of detainees and review of release conditions in the case of high risk releasees. The provision would not apply to detainees who have already been convicted of another offense because independent grounds for their detention exist.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 23

During the first four years under the bill, interim time limits are provided for the trial of individuals detained and those released pending trial who have been designated by the attorney for the Government as being of "high risk." This section would require the trial of these individuals within 90 days following the beginning of detention or designation as "high risk." Moreover, any persons designated "high risk," or detained before the effective date of the interim time limits, is [*sic*] entitled to be brought to trial within 90 days from the date this section becomes effective. The interim time limits become effective 90 days after the enactment of the bill. Failure to commence the trial of a detained person under this section results in the automatic review of the terms of release by the court and, in the case of a person already under detention, release from custody.

1974 House Committee Report 39

Section 3164 provides interim time limits for the trial of defendants who are either detained awaiting trial or have been designated by the attorney for the Government as being of "high risk." Although the Committee made no changes in this provision, it believes that the words "high risk" should be construed to mean a high risk that the defendant will not appear for trial.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Ray Thornton, 1974 House Floor Debate, 120 Cong. Rec. 41790

Representative Thornton offered amendments to change the computation date in sections 3163 and 3164 from the date of enactment to July 1, 1975. These were considered and adopted en bloc without any discussion. In offering similar amendments to sections 3165 and 3168, Representative Thornton had said that the change was proposed "in order to tie the effective date of the act to the necessary appropriations to implement the act." 120 Cong. Rec. 41789. The change had been supported by Representative Conyers, and accepted without debate.

Materials from the History of the 1979 Amendments

1979 Justice Department Bill §§ 6, 7

SEC. 6. Section 3164 of title 18, United States Code, is amended:

(a) by amending the catchline to read as follows:

"§3164. Persons detained or designated as being of high risk";

and

(b) by amending section 3164(a) to read as follows:

"(a) The trial or other disposition of cases involving—

"(1) detained persons who are being held in detention solely because they are awaiting trial, and

"(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk

shall be accorded priority."; and

(c) by amending section 3164(b) to read as follows:

"(b) The trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The periods of delay enumerated in section 3161(h) shall be excluded in computing the time limitation specified in this section.".

SEC. 7. The analysis at the beginning of chapter 208 of title 18, United States Code, is amended by deleting

"3164. Interim limits.";

and inserting in lieu thereof

"3164. Persons detained or designated as being of high risk.".

Section-by-Section Analysis of 1979 Justice Department Bill, Enclosure to Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4330 (daily ed. Apr. 10, 1979)

Section 6 of the bill amends 18 U.S.C. 3164 to carry forward the provision otherwise due to expire with the interim time limits on July 1, 1979, which requires trial within ninety days from the beginning of continuous pretrial detention of a person or the designation of a person as being of high risk. The amendment also provides that the excludable delay provisions of 18 U.S.C. 3161(h) are applicable to this expedited trial limit. *See, e.g., United States* v. *Corley*, 548 F. 2d 1043, 1044 (D.C. Cir. 1976) (per curiam); *United States* v. *Mejias*, 417 F. Supp. 579, 581-83 (S.D.N.Y.), *aff'd on other grounds, sub nom. United States* v. *Martinez*, 583 F. 2d 921 (2d Cir. 1976); Note, *The Interim Provisions of the Speedy Trial Act, An Invitation to Flee?* 46 Fordham L. Rev. 528, 530-34 (1977).

Section 7 of the bill amends the analysis at the beginning of Chapter 208 of Title 18 to conform with the amendments contained in section 6 of the bill.

1979 Judicial Conference Bill § 4

SEC. 4. Section 3164 of title 18 of the United States Code is amended by adding at the end thereof a new subsection (d), as follows:

"(d) The provisions of section 3161(h) shall be applicable to the time limit specified in section 3164(b) for the commencement of trial.".

Section-by Section Analysis of 1979 Judicial Conference Bill, Submission of Administrative Office of the U.S. Courts, 1979 Senate Hearings 734

This section would amend 18 U.S.C. § 3164 to make it clear that the authority to extend the time limits is applicable to the interim time limits provided by that section. It is included only because of the possibility that Congress will relax the schedule for implementation of the act and extend the applicability of the interim time limits. If the schedule is not changed, section 3164 will expire by its own terms on June 30, 1979.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 49

Of central importance is the Department's proposal in section 6 of its bill to make a permanent part of the Act the special interim provision of section 3164 which requires trial within ninety days from the beginning of continuous pretrial detention period [*sic*] of those detained awaiting trial and also of defendants designated "high risk" by the attorney for the government. Maintaining stricter time limits for these two classes of defendants insures that two of the most important objectives of the Act will be met: lengthy pretrial incarceration will be prevented and the opportunity of persons on bail to commit further crimes will be minimized.

Excluding these two classes of defendants substantially deals with the hardest cases. . . .

In addressing the other objectives of the Act and the remaining cases not covered by these two exclusions, and upon consideration of the fact that the current limits were established with the recognition that they were ambitious and might possibly need adjustment, the Department has proposed an increase in the allowable time limits which it believes preserves the Act so as to achieve the same objectives desired by the drafters but more efficiently and realistically.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 55

Section 6, in addition to providing for priority of disposition for persons either detained awaiting trial or designated by the United States Attorney as being of high risk, will also resolve the conflict between the circuits in the interpretation of the current interim provision by expressly stating that the delays excludable from computations under Sections 3161(b) and (c) enumerated in Section 3161(h) are excludable in the computation under this Section as well. The Act does not explicitly state that the Section 3161(h) exclusions apply to the Section 3164 limitations. On the other hand, it does not affirm the contrary. In *United States* v. *Tirasso*, 532 F. 2d 1298 (C.A. 9, 1976) the court of appeals held the exclusions inapplicable, while the contrary view was reached in *United States* v. *Corley*, 548 F. 2d 1043 (C.A.D.C. 1976), as well as in *United States* v. *Mejias*, 417 F. Supp. 579 (S.D.N.Y. 1976) aff'd on other grounds sub nom. *United States* v. *Martinez*, 538 F. 2d 921 (C.A. 2, 1976), and *United States* v. *Masko*, 415 F. Supp. 1317 (W.D. Wis. 1976). The bill adopts the more rational *Corley* interpretation, since it can hardly have been the intention of Congress to force the release of an alleged felon upon the expiration of 90 days from arrest, where much of the 90 days was consumed by commitment or* a competency examination, removal hearings or pretrial motions or appeals. Amendment of the Act to make the interim period clearly subject to the exclusions of Section 3161(h) has been recommended by 26 of the district speedy trial planning groups, by the Judicial Conference of the United States and by the Director of the Administrative Office of the United States Courts. Section 7 will amend the analysis at the beginning of the chapter to conform to the modifications wrought by Section 6.

1979 Senate Committee Report 31

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:

. . . .

(6) making the interim limits for the trial of detained or high risk defendants permanent . . . .

1979 Senate Committee Report 35-36

Section 7 amends § 3164, which establishes time limits for the trial of those persons designated to be of high risk by the Government or those in detention awaiting trial. The Committee amendment matches the Justice Department's proposals to make the interim limits permanent with respect to those two classes of defendants. Thus, high risk or detained persons will have to be tried within 90 days, as the Department has represented it is prepared to continue doing, or suffer the consequences, as currently provided.

The amendment provides specifically that excludable periods of delay apply to these cases, thereby resolving a conflict in the circuits on that issue.

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*So in original. Probably should be "for."

1979 House Committee Report 1-2

The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

. . . .

6. In the case of persons in custody or designated as "high risk" defendants, making permanent the interim limit of 90 days from commencement of custody or designation as a high risk defendant to beginning of trial, with provision for release from custody or review of the high risk designation* if this limit is exceeded; . . . .

1979 House Committee Report 12

Section 7 amends section 3164 to reinstitute and make permanent the 90-day "interim limit" on bringing to trial detained persons or persons designated as of high risk; this interim limit expired on July 1, 1979. Section 7 also specifies that section 3161(h) exclusions and continuance provisions and the section 3162 dismissal sanction apply to these cases,† thus resolving a split of the circuits on this question.

The committee points out that this recommendation for making the provisions of section 3161(h) specifically applicable to detention and high risk defendants is being offered in a bill which expands those provisions for exclusions and continuances. It is the intention of the committee that courts apply the provisions of section 3161(h) to these cases in such a manner as to extend only to the bare minimum necessary detention of persons in custody or delay in bringing to trial designated high risk defendants.

18 U.S.C. § 3172

§ 3172. Definitions.

As used in this chapter—

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

Derivation

First appeared in 1972 Senate subcommittee bill, § 3166 (p. 308). Paragraph (1) was identical to the final version except that it included judges of the Superior Court for the District of Columbia. Paragraph

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*So in original. Not an accurate description of the provision.

†So in original. Not an accurate description of the bill.

(2) appears to have been identical in substance to the final version, but the syntax was different.

1974 Senate committee bill, § 3170 (p. 333). No change.

1974 House subcommittee bill, § 3170 (p. 360). Minor language changes in paragraph (1).

1974 House committee bill, § 3172 (p. 371). Restored Senate committee language in paragraph (1); rearranged phrases in paragraph (2).

Amended on House floor, 120 Cong. Rec. 41788-89, to eliminate the reference to judges of the Superior Court for the District of Columbia in paragraph (1) and insert "Federal" before "criminal offense" in paragraph (2).

1974 act, § 3172 (p. 383).

Not amended in 1979.

There was no similar provision in the ABA standards.

Materials Addressed to Original Ervin Bill

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 263

[§ 3164](c) For purposes of computing any period of time under the provisions of this chapter, Rule 45(a), Federal Rules of Criminal Procedure, shall apply.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 260

Section 3164(c) is included to insure consistency in the computation of time under this chapter with the Federal Rules of Criminal Procedure.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 57-58

This section contains the definitions of terms used in Title I of the act. The term "offense" is defined in such a manner as to exclude defendants charged with petty offenses from the speedy trial provisions. The terms "judge" and "judicial officer" are defined so that the title applies to the Superior Court of the District of Columbia.

This provision has been added to title I by the committee. It defines "judge", "judicial officer" and "offense" so that the time limits will be applied to the Superior Court of the District of Columbia and will be applicable to defendants with any type of Federal charge except a petty offense as defined in section 1(3) of title 18 of the United States Code.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 49

Section 3170 contains the definitions of terms used in Title I of the Act. The term "offense" is defined in such a manner as to exclude defendants charged with petty offenses from the speedy trial provisions. The terms "judge" and "judicial officer" are defined so that the title applies to the Superior Court of the District of Columbia.

"Miscellaneous Amendments," Enclosure to Letter to Representative Conyers from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Oct. 1, 1974, at 1974 House Hearings 758

§ 3172. Definitions

As used in this chapter—

(1) the term "judge" or "judicial officer" means, unless otherwise indicated, any Federal district judge or United States magistrate.

(2) the term "offense" means any criminal offense which is a violation of any Act of Congress, other than a petty offense (as defined in section 1(3) of this title).

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 47

The Committee decided to exclude the Superior Court of the District of Columbia from H.R. 17409. Therefore, sections 3165, 3166(b)(1), 3169(a) and 3170 of the bill as reported from the Subcommittee were amended by striking all references to the Superior Court.*

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41788-89

The floor amendments to this section were two of a series of amendments described as "technical and conforming" amendments, which were offered by Representative Cohen and considered and adopted en bloc. There was no explanation or discussion of the amendments to this section.

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*Section numbers are those in the House subcommittee bill. The reference to the Superior Court was not in fact stricken from section 3170.

18 U.S.C. § 3173

§ 3173. Sixth amendment rights.

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

Derivation

First appeared in 1972 Senate subcommittee bill, § 3167 (p. 309). This provision was identical to the final version except that it referred to "this title" rather than "this chapter."

1974 Senate committee bill, § 3171 (p. 334). No change.

1974 House subcommittee bill, § 3171 (p. 361). Changed "title" to "chapter."

1974 House committee bill, § 3173 (p. 372). Changed "chapter" back to "title."

Amended on House floor, 120 Cong. Rec. 41788-89, to change "title" back to "chapter."

1974 act, § 3173 (p. 384).

Not amended in 1979.

There was no similar provision in the ABA standards.

Materials Addressed to Original Ervin Bill

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 36

Our final point with respect to Title I of S. 895 is the importance of making clear in the legislative history of Title I that it is a Congressional method of giving effect to the Sixth Amendment right to a speedy trial and does not purport to define or delimit the constitutional right itself. It is not intended to supersede or preempt the developing body of judicial authority as to the speedy trial right. Nor is it intended to be the sole or exclusive source of authority by which a Federal court may dismiss a charge for denial of a speedy trial.

For example, a number of courts have held that undue prosecutorial delay prior to the formal institution of a prosecution by arrest or indictment may violate the Sixth Amendment or the due process clause of the Fifth Amendment right, or may justify dismissal of the charge for want of prosecution under Rule 48(b) of the Federal Rules of Criminal Procedure or under the supervisory authority of the Federal courts over criminal justice. See, *e.g., Petition of Provoo*, 17 F.R.D. 183, 203 (D.Md.), *aff'd per curiam*, 350 U.S. 857 (1955); *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965); *Ross* v. *United States*, 349 F.2d 210 (D.C. Cir. 1965); *cf. Dickey* v. *Florida*, 398 U.S. 30, 46 (1970) (concurring opinion of Justice Brennan). It should be made explicit that S. 895, if enacted, would not overrule or modify such decisions. By prescribing statutory deadlines for trial, it creates enforceable rights to a speedy trial over and above those now available. But it is not intended to limit any other rights which have been or may hereafter be judicially recognized.

Prepared Statement of Representative Abner J. Mikva, 1971 Senate Hearings 128

Let me mention at this juncture that I am fully in agreement with recommendation #10 of Mr. Rezneck, who testified in July on behalf of the A.C.L.U. The Pretrial Crime Reduction Act should not be viewed as defining or limiting the scope of the Constitutional right to a speedy trial—it merely seeks to implement that right.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 58

The commentary on this provision in the draft report was virtually identical to the commentary at page 50 of the 1974 Senate committee report, set forth below. However, the example in the last four sentences reflected the different time limits and implementation schedule.

Materials Addressed to 1974 Senate Committee Bill

1974 Senate Committee Report 21

Enactment of S. 754 would represent Congress' judgment that the Sixth Amendment requirement of speedy trial is to be defined as trial within 90 days of arrest for the average noncomplex criminal case.

1974 Senate Committee Report 50

Section 3171 provides that nothing in the speedy trial bill shall be interpreted as a bar to a claim by a defendant that his rights to speedy trial under the Sixth Amendment of the Constitution had been violated.

At the suggestion of Senator Fong a provision has been added to title II [*sic*] of the bill clarifying the intent of the Committee that no provision of this bill is to act as a bar to a defendant's claim of denial of speedy trial under the Sixth Amendment of the Constitution. Therefore, while this bill would be an exercise of Congress' power to implement the Sixth Amendment, it is not intended to be, and obviously could not be, a conclusive interpretation precluding the courts from going beyond Congress if they found the Sixth Amendment's speedy trial provision so required. Similarly, the courts, in interpreting the Sixth Amendment, could not strike down a provision of this Act because, in its [*sic*] view, the Sixth Amendment did not require it. Conceivably a court may determine that the Sixth Amendment requires trials within 100 days. If so, the provisions of this bill permitting trials within 240 days in the second year and within 165 days in the third and fourth years would be in conflict with the Sixth Amendment, and would fail. But the fact that the bill requires trials within 90 days beginning in the fifth year would be unaffected by such a decision. Congress may not do less than the Constitution requires, but it may do more.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 26

By including language specifying that no provision in title I is to be interpreted as a bar to any claim of denial of speedy trial as required by the Sixth Amendment, the bill further clarifies the intent of the Congress in imposing uniform national time limits for the disposition of federal criminal cases.

Colloquy, 1974 House Floor Debate, 120 Cong. Rec. 41777

Mr. WIGGINS. Mr. Chairman, the second question I shall pose to the gentleman from Maine is this:

If a defendant is in fact prejudiced prior to the running of the time period specified in this bill may he nevertheless move for a dismissal on that ground?

Mr. COHEN. I would say to the gentleman from California that the defendant always will have opportunity to move for dismissal on the ground he has not received a speedy trial within the purview of the sixth amendment, which this act does not seek to in any way supersede. It is highly unlikely that any court would grant such a motion, but it is still possible.

Mr. WIGGINS. But he is not barred from making that motion even though the time limits have not expired.

Mr. COHEN. That is correct.

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41788-89

The floor amendment to this section was one of a series of amendments described as "technical and conforming" amendments, which were offered by Representative Cohen and considered and adopted en bloc. There was no explanation or discussion of the amendment to this section.

18 U.S.C. § 3174

§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c)(1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d)(1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979.

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

Derivation

Mikva bill, §§ 3164(b), (c), (d), (e) (pp. 284, 285). These subsections provided for delay in the effective date of the time limits, and for suspension of the time limits after they had become effective, if a district court was unable to meet the time limitations. The request for suspension was to be submitted by the district court, with approval of the judicial council of the circuit, to the Judicial Conference of the United States, with a copy to the Attorney General; it was to "specify the necessary authorizations and appropriations for additional judges, prosecutors, probation officers, full-time defense counsel, supporting personnel, and other resources" needed to achieve full compliance. The Judicial Conference of the United States was to determine whether and to what extent the effective date should be delayed or the time limits suspended.

Original Ervin bill, §§ 3164(b), (c), (d), (e) (pp. 293, 294). The provisions were generally similar, but with changes in the timing of some required actions and some other changes in language.

Neither the 1972 Senate subcommittee bill nor the 1974 Senate committee bill contained a similar provision.

1974 House subcommittee bill, § 3172 (p. 361). Substantially recast the earlier provisions. The provision was captioned "Judicial emergency." Subsection (a) was in substantially its final form. Subsection (b) assigned the power to grant a suspension to the Judicial Conference of the United States, acting upon application by the judicial council of the circuit, but was otherwise similar in substance to the final version. Subsection (c) required the Director of the Administrative Office to report suspensions to the Congress; it prohibited the Judicial Conference from granting a suspension within six months of the expiration of a prior suspension without the consent of Congress, except that an additional suspension of not more than one year was permitted if Congress failed to act within six months of a request for consent.

1974 House committee bill, § 3174 (p. 372). No change.

Amended on House floor, 120 Cong. Rec. 41788-89, to change "the time limits from indictment to trial" to "the time limits from arraignment to trial" in the next-to-last sentence of subsection (b). (Although the word was printed as "arrangement" in the Public Law, it appeared as "arraignment" in the Congressional Record.)

1974 act, § 3174 (p. 384).

Amended in 1979. The caption was changed, subsections (a) and (b) were amended, the former subsection (c) was reenacted with amendments as subsection (d), and new subsections (c) and (e) were added. Except as noted below, the Senate provision was accepted by the House. Major changes in the section were as follows: the power to grant a suspension was transferred from the Judicial Conference of the United States to the judicial council of each circuit; the reference to the time limit from arraignment to trial was changed to "the time limit from indictment to trial" in the next-to-last sentence of subsection (b) (not in Senate bill); procedures were established under which a district court could implement the dismissal sanction earlier than the July 1, 1980 statutory deadline (1981 in Senate bill); the power to grant a suspension within six months of the expiration of a prior suspension was limited to cases in which Congress granted consent by statute, but an exception was created for districts with suspensions in effect on the date of enactment of the 1979 amendments (Senate provision revised in House); and a new procedure was established under which a district chief judge may order a suspension, for not to exceed 30 days, without the prior consent of the circuit council.

ABA standard 2.3(b) provided for the exclusion from time-limit computations of the period of delay resulting from congestion of the trial docket "when the congestion is attributable to exceptional circumstances."

Materials Addressed to Mikva Bill

Prepared Statement of Representative Abner J. Mikva, 1971 Senate Hearings 130

Nevertheless, it may well be that even if all the judges in a given circuit were putting in a full week's work on the bench, and even if the most modern, efficient administrative techniques were employed, we would still find that the available resources are inadequate to achieve the goal of speedy and fair trials.

In this event, Section 3164 allows for a postponement of the speedy trial requirements of Section 3161. The Attorney General* is required to submit legislation to Congress providing the needed additional resources. This places the burden back where it belongs—on the shoulders of Congress. It will then be up to the representatives of the taxpayers of America to decide whether we are serious enough about crime prevention to expend the money and effort necessary to obtain it. In other words, the buck will stop here.

Letter to Representative Mikva from Judge Walter E. Hoffman, Aug. 25, 1970, at 1971 Senate Hearings 173

Under section 3164(b), it is believed that this constitutes an invitation to many district courts for additional judges, prosecutors, probation officers, etc. While there is a need for same in certain areas, the main problem has been lack of organization and the inclination on the part of some judges to let the criminal docket be handled by the United States Attorney.

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*So in original. The bill required the Judicial Conference to submit the legislation.

Materials Addressed to Original Ervin Bill

Testimony of Senator Philip A. Hart, 1971 Senate Hearings 20-21

S. 895 ultimately requires all district courts to try offenders within 60 days of arrest or indictment, whichever is earlier; there are, of course, provisions for extension in special circumstances which are strictly limited to specified instances, as when the judge makes an express finding that an extension is required in the interests of justice. However, the bill also recognizes that some districts may simply lack the resources to implement a 60-day deadline now, therefore, a district court may request deferral of its plan to meet the time limits, if it submits an inventory of these resources necessary to comply.

This flexibility is good. If speedy trial deadlines are imposed too quickly, the quality of justice will suffer; we cannot cure the problems of a fouled assembly line by speeding up the conveyor belt. But we may be able to take an interim step toward the final goal.

Subsequent to the introduction of this bill's predecessor S. 3936, in the 91st Congress, the Judicial Council of the Second Circuit Court of Appeals issued its own trial deadlines. These rules require district courts in that circuit to try all defendants within 6 months. And all incarcerated defendants must be tried within 3 months, or released until trial. The Second Circuit's rules do not provide,* as does S. 895, for tolling of these deadlines in specific exigent circumstances. But unlike S. 895, the Second Circuit's time limits are not subject to deferral on the general ground of inadequate resources to implement them.

In other words, Mr. Chairman, after canvassing the bar and bench within its jurisdiction that court of appeals has concluded that its trial courts, including the Southern District of New York, one of the busiest in the Nation, can reasonably be asked to end trial delay of more than 6 months at the present time.

This suggests the possibility of imposing a similar requirement on all district courts in S. 895. In such a revised form, S. 895 would still require trial within 60 days, unless the district court obtains an extension because of presently inadequate judicial resources. But in any event, the court would be required to reduce delay to a maximum of 6 months, within their existing resources. The feasibility of this addition to the bill should be studied in these hearings.

Prepared Statement of Daniel A. Rezneck, 1971 Senate Hearings 36

[W]e also believe that Sections 3164(b) and (e), dealing with district courts unable to implement their speedy trial plans because of limitations of manpower and resources, should be strengthened. A limit, perhaps 90 days, should be placed on the period for which any such plan may be suspended or its effectiveness deferred. Crash programs involving allocation of outside judges will have to be undertaken with respect to such districts. But without a limit, the implementation of the speedy trial plan in a district might be indefinitely delayed, and the Act could become merely precatory.

Testimony of Judge Albert Lee Stephens, Jr., 1971 Senate Hearings 74

S. 895 would serve to straighten out the question of priorities. It might even be better if it were more plainly stated that criminal cases have the first priority and that all others follow. In this respect, some judgment, of course, must be exercised because the ends of justice would be defeated if insignificant criminal cases should be allowed to occupy the time of courts while important civil cases wait.

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*So in original. Probably should be "do provide."

Testimony of Daniel J. Freed, 1971 Senate Hearings 141

I think that the position of the Department of Justice about this being a bill that might hinder the prosecution would be accurate if the bill in fact met the description given in the opening part of Assistant Attorney General Rehnquist's testimony today. I believe he said that there is mandatory dismissal with prejudice, that the bill has inflexible limits and that it goes into effect right away. But that is not an accurate description. As a matter of fact, that is the major respect in which this bill differs from all speedy trial legislation that has been enacted in this country. No time limits would be imposed on the prosecution by this bill until the prosecutor as well as the defense and the court have had an opportunity to ascertain, and the Judicial Conference of the United States and the Congress have a chance to review, whether or not the objectives of the criminal law could be realized by this legislation. Therefore, the time limits here will become effective only when the district in which the limit is operative says "we are ready to accomplish the objectives of the criminal law in our district either under your bill, or with the new procedures we have proposed, or if you give us the resources that we have designated."

Testimony of Daniel J. Freed, 1971 Senate Hearings 142

Senator ERVIN. Now, that bill has a provision which makes it as certain as words can make it that the bill will not take effect until it has been very accurately determined that a particular district has the facilities and the manpower to make the bill effective. Is that not true?

Mr. FREED. That is true, Mr. Chairman. The one amendment which I proposed to modify that would make it clear that the Department of Justice, as well as the defense bar will not lose their separate voices in stating to the Judicial Conference and the Congress that they disagree with a court's determination that the system is ready to go on a speedy timetable. If the Department of Justice can make a case for delay because it has inadequate resources, then the Congress will be able to listen to that case.

Senator ERVIN. In other words, your amendment [to the planning provisions] would ensure that other segments of society, such as the prosecution, the defense, and the general public would have a voice in that determination?

Mr. FREED: I agree, Mr. Chairman.

Statement Submitted for the Record by Senator John G. Tower, 1971 Senate Hearings 157

My one reservation about the proposed method is that it will allow some jurisdictions which are not currently able to provide the speed which we would like, to avoid affording this right for an indefinite period. I would hope that we could extract from the Congress during floor consideration of the measure a pledge that the recommendations from the various districts as to what they require to afford the right to a trial within sixty days of the bringing of the indictment would be acted upon with all possible dispatch. I feel certain that you would join in this request and would help to see that it would be fulfilled.

Amendments Offered by Senator Strom Thurmond, 117 Cong. Rec. 34142 (Sept. 30, 1971)

On page 3, after line 22, insert the following:

> "(3) Any period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.".

Remarks of Senator Strom Thurmond, 117 Cong. Rec. 34141 (Sept. 30, 1971)

This new exclusion does not attempt to excuse delays arising out of chronic congestion, but is designed to accommodate delays caused by certain unique, nonrecurring events such as riots or other mass public disorders.

"Department of Justice Proposed Amendments to Title I of S. 895," Appendix to Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 263

[§ 3166](e) In the event that a district court with respect to which sections 3161 through 3164 have become effective is subsequently unable to meet the time limitations prescribed by section 3161, the chief judge of such district may seek and the Judicial Conference may grant suspension of such limitations. Within six months of such suspension, the district court shall submit a new plan to the Judicial Conference of the United States, and the procedures of subsections (b) and (d) of this section shall be followed.

Explanation of Proposed Amendments in Letter to Senator Ervin from Assistant Attorney General William H. Rehnquist, Oct. 19, 1971, at 1971 Senate Hearings 260

It is absolutely essential that a district court be able to request an extension of the effective date of the time limits. Similarly, we agree that it is desirable that at any time after the time limits have become effective, the chief judge of a district may seek a suspension of the time limits based on the inability of the court to meet them.

Letter to Senator Ervin from Judge Allen E. Barrow, Oct. 14, 1970, at 1971 Senate Hearings 160

The only improvement that I could suggest to the provisions of Section 3164(b) would be that the District Courts be given the privilege of submitting their suggestions and plans directly to Congress. However, I am aware that this would be considered too cumbersome and, therefore, not feasible.

Materials Addressed to 1972 Senate Subcommittee Bill

1972 Draft Senate Committee Report, at 1973 Senate Hearings 57

The whole District plans section has been altered considerably from the provision as it appeared in S. 895 as introduced. For example the original provision permitted extensions of time for a district to prepare for the imposition of the 60-day time limits and allowing [*sic*] for a suspension of section 3163, the sanctions provision, if a district was unable to comply with the provision.* The committee dropped both the extension and the exemption provision because of testimony before the Subcommittee on Constitutional Rights that these provisions would be used as a loophole by some districts to avoid application of the time limits. In the place of the extension and suspension provisions the committee adopted section 3164 on interim limits and section 3161(b)(1)(B) which delays the imposition of the 60-day time limits until 3 years after enactment. Furthermore any unforeseen emergency which might call for a suspension of the speedy trial time limits would certainly fall within the "ends of justice" continuance provision, 3161(c)(8).

Materials Addressed to 1974 Senate Committee Bill

Prepared Statement of Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, 1974 House Hearings 179-80

A provision granting regulatory authority to the Judicial Conference over the provisions and operation of speedy trial plans, particularly with respect to emergency situations such as the death, resignation, or illness of judges, would appear desirable. The bill, as we read it, contains no provision respecting such emergencies.

Testimony of Earl Silbert, Member, Advisory Committee of U.S. Attorneys, 1974 House Hearings 218

I would assume your committee would be willing to include language in the statute that if the Congress at any time fails to supply the resources which have been determined to be necessary, for whatever reason the Congress may have, that the time limits imposed by this bill, which is predicated upon the providing of those resources, would become inoperative. I would assume you would be willing to do that?

Mr. CONYERS. I think we would have to consider that, but I don't think there would be any assumption that that would flow automatically. It did not over the 3 years the Senate subcommittee studied this, and it is not in the language now. They studied it really far longer than we will ever have an opportunity to, if it is the judgment of the Judiciary Committee to pass this within the 93d session of Congress.

Mr. SILBERT. But, sir, if the whole assumption is that the backlog is attributable to insufficient resources and this will help, will give an impetus to the Congress to provide those resources to comply with the time limits, then it would be only reasonable, we would submit, if the Congress for whatever reasons it deems appropriate does not provide those resources that are deemed to be necessary, that these time limits not become operative.

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*So in original. Not an accurate description of S. 895.

Prepared Statement of Judge Alfonso J. Zirpoli, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1974 House Hearings 370-71

Also, we would add a new provision, § 3161(h)(9), allowing an exception in any situation where the Judicial Conference of the United States or a committee thereof declares that a judicial emergency exists occasioned by the death or incapacity of a judge or the occurrence of such an emergency in the division or district as to make a prompt trial impossible.

"Miscellaneous Amendments," Enclosure to Letter to Representative Conyers from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Oct. 1, 1974, at 1974 House Hearings 756

The following amendment to section 3161(h) was proposed to establish an additional ground for excluding time:

Page 8, line 10.* After this line insert the following: "(9) Any delay resulting from an emergency situation, such as the illness or absence of the judge from the place of trial, or a vacancy in judicial office."

Materials Addressed to 1974 House Subcommittee Bill

Letter to Representative Peter W. Rodino, Jr., from Rowland F. Kirks, Director, Administrative Office of the U.S. Courts, Nov. 8, 1974, at 1974 House Committee Report 53

These provisions which concern the action to be taken in the event of a judicial emergency when time limits cannot be met are unduly complicated. Subsection (c) in particular should be deleted. It is cumbersome and wasteful of judicial time.

In subsection (a), in the first sentence, the words, "where the existing resources are being efficiently utilized," should be deleted. This is clearly to be a judgment made by both the judicial council and then the Judicial Conference and seems a meaningless addition to the initial step in the proceedings.

Materials Addressed to 1974 House Committee Bill

1974 House Committee Report 9

The basic differences between H.R. 17409 and S. 754 are as follows:

1. *Judicial Emergency.*—A number of witnesses, particularly the Justice Department and the Administrative Office of the United States Courts, contended that if the Congress fails to provide the necessary funds to make speedy trial a

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*So in original. Probably should refer to line 2.

reality or if a particular district is beset by an unforeseeable occurrence which would make compliance with the time limits impossible, the unwarranted dismissal of cases could result. The Subcommittee drafted an amendment to authorize the Judicial Conference of the United States to suspend the time limits between indictment and trial for up to a period of one year in the event of a judicial emergency.

2. *Phase-In.*—H.R. 17409 provides that both the sanctions and the ultimate time limits of the bill become effective in the fifth year after enactment; S. 754 provides that they become effective in the seventh year. Because of the adoption of the judicial emergency provision, the Subcommittee felt that the phase-in period could be reduced without endangering the objectives of the bill.

1974 House Committee Report 26

To abrogate the possibility that at some time in the future, after the eventual time limits of 30 and 60 days and the dismissal sanction have become effective, courts will be forced to dismiss cases because they are unable due to reasons totally beyond their control to meet those time limits, the bill incorporates a judicial emergency section. The Judicial Conference is permitted under the emergency provision to suspend the operation of the time limits between indictment and trial in individual districts for up to one year. If it finds upon reviewing the district's application that no efficient use of the district's existing resources will enable it to meet the requirements of the legislation, the conference may grant a suspension. The effect of the suspension is to allow a district found deserving of such relief to increase the indictment to trial time during the period of suspension up to 180 days. Although the Conference may not grant more than one suspension per judicial district, it may make application to the Congress for an additional suspension within six months of the end of a current suspension period and, if Congress fails to act on such an application, an additional suspension period would begin, as to that district, immediately upon the expiration of the previous one.

The application procedure that the courts must follow is designed to mesh administratively with the planning and reporting provisions of the bill and is in accord with existing statutes. The chief judge of the district, after soliciting the written views and recommendations of the planning group and the judges within the district, files an application for suspension with the judicial council of the circuit. If the council finds no alternate remedy for the district's problem upon review of its application, it may recommend a suspension to the Conference, which may then grant one for a period not to exceed one year. Within 10 days, the Director of the Administrative Office must file a report with the Congress, which must notice the granting of the application for suspension and include the recommendations of the planning group and any judge or judges of the district, together with additional or dissenting views. The Congress would then be able to determine what additional resources might be required to allow the district to meet the requirements of this legislation, using that data as a basis for action.

1974 House Committee Report 39

This authority [of the Judicial Conference to direct that district speedy trial plans be modified] is granted to the Judicial Conference in connection with its authority to suspend the time limits between indictment to trial as provided by section 3174. The authority granted by this provision would permit the Conference to recommend changes in district plans when, in its judgment, such changes would enhance the district's ability to process criminal cases. This provision should not be invoked in order to enforce uniformity or national standards in district plans for the purpose of administrative convenience.

1974 House Committee Report 42-44

Section 3174 provides that in the event a district court is unable to comply with the time limits contained in section 3161(c), concerning the period between indictment and trial, the Judicial Conference is authorized to suspend these time limits for a period up to one year. A provision recognizing the possibility of a judicial emergency in a district is not contained in S. 754. The Subcommittee drafted this amendment at the behest of the Justice Department, the Administrative Office, and other witnesses. They claimed that, in the event the Congress fails to appropriate the necessary funds to carry out the mandate for speedy trials, or unforeseeable events occur which jeopardize the operations of the courts, Section 3162 of bill [*sic*]—providing for dismissal of the indictment or information for failure to meet the time limits—would free potential criminals and backlog calendars with reindictments. Although the Committee was sympathetic to this argument, a number of safeguards contained in the Senate bill would make this contingency unlikely. The judicial emergency provision was adopted because the Committee did not wish to leave the possibility of unjustifiable dismissals to chance. Also, the Committee believes that the incorporation of this provision more than justifies the reduction of S. 754's phase-in period from seven to five years and the adoption of the sanction of dismissal with prejudice, which would prohibit reprosecution of a defendant as is permitted in that bill upon a showing of exceptional circumstances.

A suspension may be granted only on a district-by-district basis; the Judicial Conference may not suspend time limits either on a nationwide or circuit-wide basis. In order to qualify for suspension, the district court, under the direction of the chief judge, is required to evaluate the status of its court calendars to determine the nature and extent of the emergency and whether existing resources are being efficiently utilized.

The chief judge is required to seek the recommendations of the district's planning group prior to applying to the judicial council of the circuit for a suspension. A reasonable period of time, under the particular circumstances of the district, should be allowed before an application for a suspension is filed in order to give the planning group an opportunity to respond.

The recommendations of the planning group should be in writing and must set forth compelling reasons why a suspension should either be requested or not requested. The recommendations submitted to the district court should contain the additional or dissenting views of any member of the planning group with respect to the advisability of recommending an application for a suspension of time limits, although they are not binding upon the district court.

The recommendations of the planning group need not be elaborate, but should contain enough information to justify an application by the chief judge for a time suspension. The Committee recognizes the need for speed in certain situations, particularly when a district is meeting the time limits and an unforeseeable event occurs which would require a speedy application to the judicial council for a suspension. In this event, the need for an immediate response to the problem may not justify the filing of written recommendations. However, the recommendations should be reduced to writing as soon as possible and filed with the district court for submission to the judicial council of the circuit and, if necessary, to the Judicial Conference. All recommendations concerning suspensions made by a planning group either before or following the filing of the application by the district court must be sent to the Congress as part of the report required by section 3167.

The chief judge should also seek the recommendations of the judges of his district. As in the procedure for seeking the recommendations of the planning group, the chief judge should undertake to provide enough time for the receipt of views and those views, whether favoring or opposing a suspension, should be made a part of the district application for a suspension to the judicial council of the circuit.

Based upon the information and statistics contained in the application of the district court, the judicial council of the circuit is required to determine the capabilities of the district and to make any appropriate recommendations that would alleviate calendar congestion, particularly the use of visiting judges. If the judicial council finds that no remedy for congestion is reasonably available, it may apply to the Judicial Conference for a suspension of the indictment to trial time limits. The Conference, after a review of the request, is authorized to grant a suspension of the time limits for a period not to exceed one year. The effect of this provision is to allow each district to increase up to 180 days the indictment to trial time limit during the period of suspension. For example, if a district is in the fifth year of operation under the bill, it may increase the indictment to trial time limit from 70 to 180 days. The Committee believes that any district court which successfully meets the time standards in the first four years should be in a position in the ensuing years to perform at least as well as it did in the previous years. With respect to increasing the time limits between indictment and trial, following the approval by the Judicial Conference of a suspension, the district court in its discretion may extend the time limits beyond the existing time limits, so long as a defendant is not required to await the commencement of trial for a period of not to exceed [*sic*] 180 days.

The Committee exempted from the judicial emergency provision the extension of the indictment to trial time limits during a suspension for individuals who are being detained solely because they are awaiting trial. Also, the judicial emergency provision does not apply to defendants who were indicted prior to the effective date of a suspension.

In order to insure that the Congress is informed of all suspensions of time limits granted by the Judicial Conference, the Director of the Administrative Office is required to submit a report to the Congress within 10 days of the granting of any suspension. The report should contain the recommendations of the planning group and any judge or judges of the district, together with the additional or dissenting views of any of the foregoing. This is to insure that the Congress will maintain effective oversight over the granting of suspensions. The authority to grant suspensions is a serious matter and should not result in an unequal application of the law for certain individuals, merely because their indictment happened to be filed at a time when the court was experiencing a judicial emergency. The Congress, in imposing specific time limits on the period between indictment and trial, has made a legislative decision that defendants are entitled under the Constitution to a trial within 70 days of indictment and that the courts are capable of providing trials within that period of time. However, because of the unique circumstance in which the Congress has placed the courts by enacting speedy trial legislation without providing advanced [*sic*] increases in resources, it is also providing the courts with a tool that would permit them enough flexibility to prevent a miscarriage of justice by dismissing the indictments or informations against potential criminals because of circumstances beyond the control of an individual court.

The Judicial Conference has the authority under H.R. 17409 to grant only one suspension in any given district. If the Conference finds that a district requires another suspension within less than six months following the end of a previous suspension, an application for the additional suspension must be made to the Congress. The Congress has six months in which to act; if it fails to act, the suspension would become effective immediately upon the expiration of the six-month period. In the event that, during any period of suspension, if [*sic*] the Director of the Administrative Office finds that any additional relief time is necessary, he may apply directly to the Congress for the suspension. For example, should it be apparent at any time prior to the filing of the Director's report, detailing the reasons for the first suspension, that an additional period is necessary, he could submit an application as part of this report. In this event, the six-month period in which the Congress has to act upon an application would be measured during the time of the existing suspension and, therefore, would not result in hardship to the district. This provision is not intended as a security blanket, and applications for additional suspensions should not be filed as a matter of course. Each report to Congress must contain detailed reasons for granting both the initial suspension and the need for an additional one. Any additional suspension occasioned by the inaction of the Congress will not exceed one year.

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41775

The second basic difference between the Senate and House bills is the presence in H.R. 17409 of the "judicial emergency" section. During the hearings a number of witnesses expressed the fear that if Congress failed to appropriate the necessary resources to effectively implement the standards of this act, the wholesale dismissals would result, not by reason of the courts' inefficiency, but because of congressional inaction. Fears were also expressed that unforeseen circumstances such as a riot or the death of one or more district judges, could cause an unmanageable backlog, in the criminal docket of a particular district. To provide relief for such situations, the Subcommittee on Crime included a provision in the bill which would allow the Judicial Conference of the United States to suspend the operation of this act for periods up to one year in the event of a "judicial emergency."

Materials Addressed to 1974 House Floor Amendments

Remarks of Representative Cohen, 1974 House Floor Debate, 120 Cong. Rec. 41788-89

The floor amendment to this section was one of a series of amendments described as "technical and conforming" amendments, which were offered by Representative Cohen and considered and adopted en bloc. There was no explanation or discussion of the amendment to this section.

Materials from the History of the 1979 Amendments

1979 Justice Department Bill § 8

SEC. 8. Section 3174 of title 18, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) If the chief judge of the district court concludes that the need for suspension of the time limits under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. An application to the judicial council of the circuit pursuant to subsection (a) shall be filed within ten days of such order.".

Section-by-Section Analysis of 1979 Justice Department Bill, Enclosure to Letter to Vice-President Walter F. Mondale from Attorney General Griffin B. Bell, Apr. 10, 1979, at 125 Cong. Rec. S4330 (daily ed. Apr. 10, 1979)

Section 8 amends 18 U.S.C. 3174 to authorize the chief judge of a district, upon stated conditions of a judicial emergency, to order the time limits of the Act suspended for no more than thirty days. An application to the judicial council of the circuit, under 18 U.S.C. 3174(a), must be filed within ten days of such an order.

1979 Judicial Conference Bill § 5

SEC. 5. Section 3174 of title 18 of the United States Code is amended as follows:

(1) by striking out the first two sentences of subsection (b), and inserting the following sentence in lieu thereof: "If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period.";

(2) by striking out "arrangement" in the third sentence of subsection (b), and inserting in lieu thereof "arraignment";

(3) by striking out subsection (c), and inserting in lieu thereof the following:

"(c) Any suspension of time limits granted by a judicial council shall be reported within ten days of approval to the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth detailed reasons for granting such approval, and a proposal for alleviating congestion in the district. The Director of the Administrative Office of the United States Courts shall forthwith transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress. If the judicial council concludes that an additional period of suspension within such six-month period is necessary, it shall report that conclusion to the Judicial Conference of the United States, together with the application from the district court for such additional period of suspension and any other pertinent information. If the Judicial Conference agrees that such additional period of suspension is necessary, it may request the consent of the

Congress thereto. Should the Congress fail to act on any such request within six months, the suspension may be granted for an additional period not to exceed one year."; and

(4) by adding after subsection (c) a new subsection (d) as follows:

"(d) If the chief judge of the district court concludes that the need for suspension of the time limits under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. An application to the judicial council of the circuit pursuant to subsection (a) shall be filed within ten days of such order.".

Section-by-Section Analysis of 1979 Judicial Conference Bill, Submission of Administrative Office of the U.S. Courts, 1979 Senate Hearings 734.

This section would amend 18 U.S.C. § 3174, dealing with "judicial emergencies." It would permit suspensions of the time limits to be granted by the judicial council of each circuit, rather than requiring the approval of the Judicial Conference of the United States. It would also permit the chief judges of district courts, where the need for suspension of the time limits is of great urgency, to suspend the limits for not more than 30 days, thus providing time for the preparation of an application to the judicial council and for council consideration thereof.

The section would also correct a typographical error ("arrangement" for "arraignment") in the existing statute.

Prepared Statement of Assistant Attorney General Philip B. Heymann, 1979 Senate Hearings 55

Section 8 will provide an effective method for dealing with judicial emergencies, in addition to the cumbersome procedures now provided by Section 3174, by vesting executive authority in the chief judge of the district. The proposal is identical with that of the Judicial Conference Committee on the Administration of Criminal Law.

Prepared Statement of Judge Alexander Harvey II, Chairman, Judicial Conference Committee on the Administration of the Criminal Law, 1979 Senate Hearings 62-63

Both bills likewise suggest changes in provisions relating to judicial emergencies. Under § 3174, the chief judge of a district court, in the event of an emergency, may apply to the judicial council of the circuit for a suspension of the Act's time limit. The council in turn may apply to the Judicial Conference, which is empowered to suspend the time limits for a period of time not to exceed one year. However, the Act does not provide for any temporary suspension of the time limits during the time that might be required for processing such an application by the circuit council and by the Judicial Conference. Judicial emergencies such as the death or incapacitation of a judge, particularly in one or two judge districts, may arise suddenly and may result after July 1, 1979 in dismissals of indictments because of the time required to secure circuit council or Conference approval of a suspension of the time limits. Both bills therefore propose that the Act be amended to grant authority to the chief judge of each district to declare a temporary judicial emergency and suspend the time limits for no longer than 30 days, during which time an application to the circuit council and the Conference for a longer suspension would have to be filed within ten days of the date of the entry of the temporary suspension.

The Judicial Conference bill would go further and would permit the judicial council of the circuit rather than the Judicial Conference itself to permit the suspension of the Act's time limits for a period of time not to exceed one year. The Conference meets only twice a year, whereas the judicial councils of the various circuits meet regularly, would be more familiar with emergencies occurring within their circuits, and would be therefore better equipped to act promptly on requests from a district court for a suspension of the time limits. It is thus proposed in the Judicial Conference bill that the power to grant such suspensions be transferred from the Judicial Conference to the judicial councils [*sic*] of each circuit.

1979 Senate Committee Bill

The 1979 amendments to section 3174 were generally as provided in the Senate committee bill. However, under the Senate committee bill, the reference to "the time limit from indictment to trial" in the next-to-last sentence of subsection (b) would have been to "the time limit from arraignment to trial"; the reference to 1980 in paragraph (1) of subsection (c) would have been to 1981; and the portion of subsection (d) following paragraph (1) would have read as follows:

(2) The Director of the Administrative Office of the United States Courts shall forthwith transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress.

(3) If the judicial council concludes that an additional period of suspension within such six-month period is necessary, it shall report that conclusion to the Judicial Conference of the United States, together with the application from the district court for such additional period of suspension and any other pertinent information. If the Judicial Conference agrees that such additional period of suspension is necessary, it may request the consent of the Congress thereto. If the Congress fails to act on any such request within six months, the suspension may be granted for an additional period not to exceed one year.

1979 Senate Committee Report 31-32

Other major areas of importance to all parties upon which agreement has been reached and which are included in the consensus substitute are as follows:

. . . .

> (11) giving the chief judge of a district the power to suspend the final time limits up to thirty days, under emergency conditions [§ 3174(e)].*

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*Brackets in original.

1979 Senate Committee Report 36-37

Section 10 amends § 3174, the judicial emergency provision, to accomplish several important objectives:

First, the provision is amended to make the application-for-suspension process less cumbersome, by eliminating the requirement that the application be processed all the way up through the Judicial Conference before emergency suspensions take effect. As both the Department of Justice and Judicial Conference pointed out, the Judicial Conference meets only twice annually, and—although the application approval function could be delegated in some fashion—the Committee believes that the judicial councils of each circuit are more capable and desirable for performing such a function. Judicial councils are closer to the problems of individual districts, and permitting each council to perform the suspension approval function will increase the overall flexibility of the provision. The Committee cautions circuit councils to take this role seriously and approach it with a great deal of circumspection.

Second, the section is amended to permit the chief judge of any district, with the approval of the planning group, to apply to the circuit council to implement the provisions of § 3162 at any time prior to the date the sanctions become effective, if there is concurrence that the district is ready to implement them fully. This is a vital corollary to the deferral scheme, since, as both the Department of Justice's OIAJ study and the General Accounting Office pointed out, straight deferral—without more—will deprive the Congress and the system of experience more nearly approximating post-sanction conditions. The Committee encourages those districts, particularly the seventeen that are now operating under the Act's final time limits, who feel capable of implementing the dismissal sanctions to do so, as it will provide the Congress with a much better indication of how the Act is likely to affect the system and whether major changes should be made. Should any districts choose to implement § 3162 during the deferral interval, the Committee expects both the Administrative Office and the Department of Justice to pay close attention to their experiences and problems.

Third, the amendment preserves the reporting requirements and the involvement of the Congress in the suspension process and assures that the initial interval remains in effect.

Finally, acceding to the request of both the Department and the Conference, the bill as amended amends the suspension provisions to permit the chief judge of any district to suspend the operation of the time limits in his district for up to thirty days, provided he finds the need to do so is of "great urgency" and files an application for suspension under the formal, statutory process within 10 days. The Committee believes that situations may arise where the exercise of such authority is necessary and, further, that chief judges are in the best position to judge when an emergency is of such magnitude that immediate suspension is the only way to forestall disaster. The Committee asks and expects that chief judges will exercise this authority in good faith and sparingly.

1979 House Committee Report 1-2

The purpose of the bill, as hereby reported, is to amend title I of the Speedy Trial Act of 1974 (18 U.S.C. 3161-3174) in the following manner:

. . . .

11. By amending the provisions of section 3174, relating to extension of time limits due to judicial emergency, to provide for final approval of such extensions by the circuit councils, and by modifying the provisions for the granting of additional extensions of time limits beyond the initial extension; and

12. By authorizing the chief judge of each district to suspend the time limits of section 3161 for a period of thirty days, when the need for such a suspension is found by the chief judge to be of great urgency.

1979 House Committee Report 9-10

The bill as reported by the committee retains the Senate provision permitting district courts, upon application to and approval by the circuit council, to reinstitute the dismissal sanction prior to July 1, 1980, on which date the dismissal sanction is to be imposed in all districts. The committee gave serious consideration to reversing this process, and requiring that districts wishing to be exempt from the sanction apply to be excused rather than requiring that districts wishing to continue under the law seek permission to do so. The committee ultimately did not adopt this approach, in the interest of having the suspension in effect at the earliest date in those districts facing serious dismissal problems. Under the bill reported by the committee, the sanction would be immediately suspended in all districts upon the signing of the act by the President. We note the fact that many districts have demonstrated an ability and a willingness to fully implement the act, with sanctions, and that many districts chose to apply the permanent time limits long before July 1, 1979. We urge all districts to do so to reinstitute the dismissal sanction [*sic*].

1979 House Committee Report 10-11

The committee reviewed the existing provisions of section 3174 relating to judiciary* emergency, and found that amendments were needed in the provisions regarding requests for a second or subsequent suspension of time limits under the judicial emergency. First, the requirement for "consent of the Congress" was found to be unduly vague, in that no guidance is given as to how the Congress is to express that consent. The committee would resolve this by requiring that any such consent be expressed "by Act of Congress." Second, the committee determined that during this final phase-in period authorized by this bill, districts presently under a judicial emergency suspension of limits should not be prohibited from obtaining a renewal of that suspension without Congressional approval. Finally, language presently in the law allowing renewals of suspensions without the consent of Congress if the Congress fails to act within 6 months on such a request is deleted. The provision is found to be unnecessary and perhaps meaningless, in view of the fact the requirement of Congressional consent itself expires 6 months after the expiration of the suspension for which renewal is sought.

1979 House Committee Report 13

Section 10 amends section 3174 by—

(a) Placing final authority in the circuit councils over the grant of extensions of time limits under conditions of judicial emergency, rather than in the Judicial Conference;

(b) Authorizing districts to reinstitute the dismissal sanction of section 3162 earlier than the scheduled date of July 1, 1980;

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*So in original. Probably should be "judicial."

(c) Amending the provisions relating to reapplication for suspension of time limits under the judicial emergency provisions by—

(1) exempting districts under such judicial emergencies on the effective date of these amendments from the "consent of Congress" requirement;

(2) requiring that, when consent of Congress is required, it be extended by Act of Congress; and

(3) deleting a provision to the effect that renewals of suspension may be granted without the consent of Congress if Congress has failed to act on such a request for six months; and

(d) Authorizing chief district court judges to grant 30-day suspensions of section 3161 time limits under conditions of great urgency.

PART 3

Texts of Bills

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Mikva Bill

92D CONGRESS
1ST SESSION

H. R. 7107

IN THE HOUSE OF REPRESENTATIVES

APRIL 1, 1971

Mr. MIKVA (for himself, Mr. KOCH, Mr. ABOUREZK, Mr. ANDERSON of California, Mr. ASHLEY, Mr. BELL, Mr. BIAGGI, Mr. BOLLING, Mrs. CHISHOLM, Mr. CLAY, Mr. CLEVELAND, Mr. CORMAN, Mr. DENT, Mr. DENHOLM, Mr. DONOHUE, Mr. EDWARDS of California, and Mr. EILBERG) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To assist in reducing crime by requiring speedy trials in cases of persons charged with violations of Federal criminal laws, to strengthen controls over dangerous defendants released prior to trial, to provide means for effective supervision and control of such defendants, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Pretrial Crime Reduction Act of 1971".

TITLE I—SPEEDY TRIALS

Section 701 of title 18, United States Code, is amended by adding a chapter 208, as follows:

"Chapter 208.—SPEEDY TRIALS

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. Inability to comply; reponsibility of Congress.

"§ 3161. Time limits and exclusions

"(a) The trial of a defendant charged with an offense against the United States shall be commenced within one hundred and twenty days, or in the case of a defendant charged with a crime of violence, within sixty days, determined as follows:

"(1) From the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed earlier, from the date of such filing;

"(2) If the indictment or information is dismissed upon motion of the defendant and thereafter the defendant is charged with the same crime or a crime based on the same conduct or arising from the same criminal episode, from the date the defendant is so charged, as stated in the preceding paragraph; or

"(3) If the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, from the date of the mistrial, order granting a new trial, or remand.

"(b) The following periods shall be excluded in computing the time for trial:

"(1) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, examination and treatment pursuant to section 2902 of title 28, United States Code, hearings on pretrial motions, interlocutory appeals, and trial of other charges;

"(2) The period of delay during which prosecution is deferred by the United States attorney pursuant to written agreement with the defendant for the purpose of allowing the defendant to demonstrate his good conduct;

"(3) The period of delay resulting from the absence or unavailability of the defendant;

"(4) If the information or indictment is dismissed upon motion of the United States attorney and thereafter within a reasonable period a charge is filed against the defendant for the same offense or an offense required to be joined with that offense, the reasonable period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge;

"(5) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him;.

"(6) The period of delay resulting from a continuance granted at the request of the defendant or his counsel upon a showing of good cause; and

"(7) The period of delay resulting from one continuance not to exceed sixty days in duration granted at the request of the United States attorney upon a showing of good cause and special circumstances peculiar to that case which justify such continuance.

"(c) For purposes of this chapter, the term 'crime of violence' means voluntary manslaughter, murder, rape, kidnaping, robbery, burglary, extortion accompanied by threats of violence, assault with a dangerous weapon or assault with intent to commit any offense punishable by imprisonment for more than one year, arson punishable as a felony.

"§ 3162. Sanctions

"(a) When the court has set a date certain for trial and on such date the defendant, his counsel, or both fail to proceed to trial without justification, the court may punish the responsible person for criminal contempt.

"(b) If a defendant is not brought to trial as required by section 3161 the information or indictment shall be dis-

by section 3161 the information or indictment shall be dis-

missed on motion of the defendant. Such dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined with the offense. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty shall constitute a waiver of the right to dismissal.

"§ 3163. Effective dates

"(a) The time limitation in section 3161 (a) shall apply (1) to defendants charged with crimes of violence in informations or indictments filed more than six months after enactment, and (2) to defendants charged with offenses other than crimes of violence in informations or indictments filed more than six months after enactment and continuously held in custody on such charges.

"(b) Except as suspended or extended under section 3164, the time limitation in section 3161 (a) shall apply to all other offenses charged in informations or indictments, and in the District of Columbia to all other offenses prosecuted by the United States, filed more than eighteen months after enactment, except that section 3161 (a) shall not apply to trial of offenses under the antitrust, securities, or tax laws of the United States.

"§ 3164. Inability to comply; responsibility of Congress

"(a) Each United States district court, with the approval of the judicial council of the circuit, shall within one year of the date of enactment prepare a plan for the trial or other disposition of offenses under section 3163. Each such plan shall be formulated after considering the recommendations of the Federal Judicial Center, the United States attorney, and attorneys experienced in the defense of criminal cases in the district, and shall be filed with the Administrative Office of the United States Courts. Each such plan shall include a description of the procedural techniques, innovations, systems, and other methods by which the district court has expedited or intends to expedite the trial or other disposition of criminal cases.

"(b) In the event a district court is unable because of limitations of manpower or resources to implement its plan for the trial or other disposition of criminal cases as provided in section 3163 (b) its plan shall, with the approval of the judicial council of the circuit, be submitted to the Judicial Conference of the United States, with a copy to the Attorney General, and shall request a suspension or extension of the effective date specified in section 3163 (b). In addition to the information required under section 3164 (a), each such plan in which a suspension or extension is requested shall specify the necessary authorizations and appropriations for additional judges, prosecutors, probation officers, full-time defense counsel, supporting personnel, and other resources without which full compliance with section 3163 (b) cannot be achieved.

"(c) On or before eighteen months from the date of enactment, the Judicial Conference shall determine after considering such views as the Attorney General may offer on the proposed district plans, whether and to what extent section 3163 (b) is to be suspended as to each district.

"(d) Within eighteen months after enactment the Judicial Conference shall submit a report to Congress detailing the district plans submitted to it under sections 3164 (a) and (d), the action taken by the Judicial Conference under section 3164 (c), and the legislative proposals and appropriations necessary to achieve compliance with the time limitations provided in section 3161.

"(e) In the event that a district court with respect to which section 3163 (b) has become effective is subsequently unable to meet the time limitations prescribed by section 3161 (a), the chief judge of such district may seek and the Judicial Conference may grant suspension of such limitations as provided in subsection (b) of this section.".

Original Ervin Bill

92D CONGRESS
1ST SESSION

S. 895

IN THE SENATE OF THE UNITED STATES

FEBRUARY 22 (legislative day, FEBRUARY 17), 1971

Mr. ERVIN (for himself, Mr. BAYH, Mr. BIBLE, Mr. BURDICK, Mr. CANNON, Mr. CURTIS, Mr. EAGLETON, Mr. FONG, Mr. GURNEY, Mr. HART, Mr. HRUSKA, Mr. HUGHES, Mr. INOUYE, Mr. JAVITS, Mr. KENNEDY, Mr. MCCLELLAN, Mr. MCINTYRE, Mr. MATHIAS, Mr. MONDALE, Mr. MOSS, Mr. MUSKIE, Mr. PACKWOOD, Mr. PELL, Mr. TALMADGE, and Mr. THURMOND) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To give effect to the sixth amendment right to a speedy trial for persons charged with offenses against the United States, and to reduce the danger of recidivism by strengthening the supervision over persons released on bail, probation, or parole, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Speedy Trial Act of 1971".

II

TITLE I—SPEEDY TRIALS

SEC. 101. Title 18, United States Code, is amended by adding immediately after chapter 207 a new chapter 208, as follows:

"Chapter 208.—SPEEDY TRIALS

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. District plans.

"§ 3161. Time limits and exclusions

"(a) When a defendant charged with an offense against the United States first appears before the court for the setting of release conditions under section 3146 the judge shall, after consultation with the counsel for the defendant and the United States attorney, set a day certain for the trial.

"(b) The trial of a defendant charged with an offense against the United States shall be commenced as follows:

"(1) Within sixty days from the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed, then within sixty days from the date of such filing;

"(2) If the indictment or information is dismissed upon motion of the defendant and thereafter the defendant is charged with the same crime or a crime based on the same conduct or arising from the same criminal episode, within sixty days from the date the defendant is so charged; or

"(3) If the defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, within sixty days from the date of the mistrial, order granting a new trial, or remand.

"(c) The following periods of delay shall be excluded in computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to, an examination and hearing on competency, any period of delay resulting from the fact that he is incompetent to stand trial, or resulting from an examination and treatment pursuant to section 2902 of title 28, United States Code, and any period of delay resulting from hearings on pretrial motions, interlocutory appeals, or trials with respect to other charges.

"(2) Any period of delay during which prosecution is deferred by the United States attorney pursuant to written agreement with the defendant for the purpose of allowing the defendant to demonstrate his good conduct.

"(3) Any period of delay resulting from the absence or unavailability of the defendant.

"(4) If the information or indictment is dismissed upon motion of the United States attorney and thereafter a charge is filed against the defendant for the same offense or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(5) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limit applicable to him.

"(6) Any period of delay resulting from a continuance granted at the request of the defendant or his counsel upon a showing of good cause, if such request is made more than fifteen days prior to the date set for trial, but in no event shall any such period of delay be excludable for any period in excess of seven days.

"(7) Any period of delay resulting from a continuance granted at the request of the United States attorney upon a showing of good cause, if such request is made more than fifteen days prior to the date set for trial, but in no event shall any such period of delay be excludable for any period in excess of seven days.

"(8) Any other period of delay resulting from a continuance granted at the request of the defendant or his counsel or the United States attorney upon a finding by the judge that, unless such a continuance is granted, the ends of justice cannot be met. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court, after first having considered the right of the defendant to a speedy trial and the public interest in a prompt disposition of the case, sets forth in writing in the record of the case its reason for granting such continuance.

"§ 3162. Sanctions

If a defendant, through no fault of his own or his counsel, is not brought to trial as required by section 3161, the information or indictment shall be dismissed on motion of the defendant. Such dismissal shall forever bar prosecution for the offense charged and for any other offense required to be joined with the offense. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty shall constitute a waiver of the right to dismissal.

"§ 3163. Effective dates

"(a) The time limitations in section 3161 shall apply—

"(1) to defendants charged with any of the following offenses in informations or indictments filed more than ninety days after the effective date of this chapter, and continuously held in custody on such charge:

"(A) murder;

"(B) voluntary manslaughter;

"(C) rape;

"(D) carnal knowledge of a female under the age of sixteen, or taking immoral, improper, or indecent liberties with a child under the age of sixteen years;

"(E) robbery;

"(F) burglary;

"(G) kidnaping;

"(H) arson;

"(I) assault with a dangerous weapon;

"(J) assault with intent to commit any offense;

"(K) mayhem;

"(L) unlawful sale or distribution of a narcotic, depressant, or stimulant drug (as defined by any Act of Congress), if the offense is punishable by imprisonment for more than one year;

"(M) threatening, injuring, or intimidating any prospective witness or juror for the purpose of obstructing or attempting to obstruct justice;

"(N) extortion or blackmail accompanied by threats of violence; or

"(O) an attempt or conspiracy to commit any of the foregoing offenses, as defined by any Act of Congress, if the offense is punishable by imprisonment for more than one year; and

"(2) to defendants charged with any offense referred to in paragraph (1) of this subsection, in informations or indictments filed more than one hundred and twenty days after the effective date of this chapter, and not continuously held in custody on such charge.

"(3) to defendants charged with any offense, other than an offense referred to in paragraph (1) of this subsection, in informations or indictments filed more than one hundred and eighty days after the effective date of this chapter, and continuously held in custody on such charge.

"(b) Except as extended under section 3164, the time limitation in section 3161 shall apply to all other offenses (other than offenses within the purview of paragraph (1) or (2) or (3) of subsection (a)) charged in informations or indictments filed more than eighteen months after the effective date of this chapter; except that section 3161 shall not apply to the trial of offenses filed under the antitrust, securities, or tax laws of the United States.

"§ 3164. District plans

"(a) Each United States district court, with the approval of the judicial council of the circuit, shall, within ninety days of the effective date of this chapter, prepare a plan for the trial or other disposition of offenses under section 3163. Each such plan shall be formulated after considering the recommendations of the Federal Judicial Center, the United States attorney, and attorneys experienced in the defense of criminal cases in the district, and shall be filed with the Administrative Office of the United States Courts. Each such plan shall include a description of the procedural techniques, innovations, systems, and other methods by which the district court has expedited or intends to expedite the trial or other disposition of criminal cases. The plan shall make special provision for the speedy trial of cases at places of holding court where there is no judge continuously resident.

"(b) In the event a district court is unable because of limitations of manpower or resources to implement its plan for the trial or other disposition of criminal cases as provided in section 3163 (b), its plan shall, with the approval of the judicial council of the circuit, be submitted to the Judicial Conference of the United States, with a copy to the Attorney General, and shall request an extension of the effective date specified in section 3163 (b). In addition to the information required under subsection (a) of this section, each such plan in which an extension is requested shall specify the necessary authorizations and appropriations for additional judges, prosecutors, probation officers, full-time defense counsel, supporting personnel, and other resources without which full compliance with section 3163 (b) cannot be achieved.

"(c) On or before fifteen months from the effective date of this chapter, the Judicial Conference shall determine whether and to what extent section 3163 (b) is to be extended as to each district.

"(d) Within eighteen months after such effective date, the Judicial Conference shall submit a report to Congress detailing the district plans submitted to it under subsections (a) and (b) of this section, the action taken by the Judicial Conference under subsection (c) of this section, and the legislative proposals and appropriations necessary to achieve compliance with the time limitations provided in section 3161.

"(e) In the event that a district court with respect to which section 3163 (b) has become effective is subsequently unable to meet the time limitations prescribed by section 3161, the chief judge of such district may seek and the Judicial Conference may grant suspension of such limitations as provided in subsection (b) of this section.".

93d CONGRESS
1st Session

S. 754

IN THE SENATE OF THE UNITED STATES

February 5, 1973

Mr. Ervin (for himself, Mr. Bayh, Mr. Beall, Mr. Bennett, Mr. Bentsen, Mr. Bible, Mr. Brooke, Mr. Burdick, Mr. Cannon, Mr. Case, Mr. Chiles, Mr. Church, Mr. Cranston, Mr. Eagleton, Mr. Fong, Mr. Gurney, Mr. Hart, Mr. Hatfield, Mr. Hollings, Mr. Hughes, Mr. Humphrey, Mr. Inouye, Mr. Jackson, Mr. Javits, Mr. Kennedy, Mr. McClellan, Mr. McGee, Mr. McGovern, Mr. McIntyre, Mr. Magnuson, Mr. Mathias, Mr. Mondale, Mr. Moss, Mr. Muskie, Mr. Nelson, Mr. Packwood, Mr. Pastore, Mr. Pell, Mr. Percy, Mr. Randolph, Mr. Roth, Mr. Stevens, Mr. Stevenson, Mr. Talmadge, Mr. Thurmond, Mr. Tunney, and Mr. Williams) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses and to reduce the danger of recidivism by strengthening the supervision over persons released pending trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Speedy Trial Act of 1973".

TITLE I—SPEEDY TRIALS

Sec. 101. Title 18, United States Code, is amended by adding immediately after chapter 207 a new chapter 208, as follows:

II—O

"CHAPTER 208.—SPEEDY TRIALS

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. Interim limits.
"3165. District plans.
"3166. Definitions.
"3167. Sixth amendment rights.

"§ 3161. Time limits and exclusions

"(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set a day certain for trial.

"(b) The trial of a defendant charged with an offense shall be commenced as follows:

"(1) (A) Within sixty days from the date the defendant is arrested or served with a summons, except that if the prosecution is initiated by filing an information or indictment prior to arrest or summons (and made public) then within sixty days from the date of such filing;

"(B) Notwithstanding the provisions of subclause (A) of this clause, for the first twelve-calendar-month period following the effective date of this chapter as set forth in section 3163 of this chapter, the time limits imposed by such subclause (A) shall be one hundred and eighty days, and for the second such twelve-month period, such time limits shall be one hundred and twenty days.

"(2) If the indictment or information is dismissed upon motion of the defendant for reasons other than those provided in section 3162(a) and thereafter the defendant is charged with the same offense or an offense based on the same conduct or arising from the same criminal episode, within sixty days from the date the defendant is arrested or served with a summons with respect to such charge, except that if the prosecution is initiated by filing an information or indictment prior to arrest or summons (and made public), then within sixty days from the date of such filing; or

"(3) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

"(c) The following periods of delay shall be excluded in computing the time within which the trial of any such offense must commence:

"(1) (A) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

"(i) delay resulting from any examination and hearing on competency;

"(ii) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

"(iii) delay resulting from trials with respect to other charges against the defendant;

"(iv) delay resulting from interlocutory appeals; and

"(v) delay resulting from hearings on pretrial motions.

"(B) With respect to any delay referred to in clause (1) (A) of this subsection, only such court days as are actually consumed in connection with any pretrial motion or other hearing, examination, presentation of an interlocutory appeal, or a trial with respect to another charge shall be excluded, and in no event shall any period of delay which occurs while any of the aforementioned matters under clause (1)(A) are under advisement or are awaiting decision be so excluded.

"(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

"(3)(A) Any period of delay resulting from the absence or unavailability of the defendant.

"(B) For purposes of subclause (A) of this clause, a defendant shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subclause, a defendant shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists being returned for trial.

"(4) Any period of delay resulting from the fact that the defendant is incompetent to stand trial.

"(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

"(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

"(8) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice and the best interest of the public as well as the defendant would be served thereby. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice and the best interest of the public and the defendant were served by the granting of such continuance.

"(d) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed arraigned on the information or indictment with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea of guilty becomes final."

"§ 3162. Sanctions

"(a) If a defendant is not brought to trial as required by section 3161, the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion except that the Government shall have the burden of proof of establishing any exclusion of time under subparagraph 3161 (c) (3). Such dismissal shall forever bar prosecution for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

"(b) In any case in which counsel for the defendant or the attorney for the government (1) knowingly allows a date certain for trial to be set without disclosing the fact that a necessary witness would be unavailable for trial on such date; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial on the date set for trial without justification consistent with section 3161 of this chapter, the court may punish any counsel or attorney, as the case may be, as follows:

"(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

"(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

"(C) by imposing on any attorney for the Government a fine of not to exceed $250;

"(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

"(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

"(c) The court shall follow Rule 42 of the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

"§ 3163. Effective dates

"The time limitation in section 3161—

"(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1973; and

"(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

"§ 3164. Interim limits

"(a) During an interim period commencing ninety days following the date of the enactment of the Speedy Trial Act of 1973 and ending on the date immediately preceding the date on which the time limits provided for under section 3161 (b) (1) (A) of this chapter become effective, each district (and the Superior Court for the District of Columbia) shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

"(1) detained persons who are being held in detention solely because they are awaiting trial. and

"(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

"(b) During the period such plan is in effect, the trial of any person who falls within subparagraph (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

"(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

"§ 3165. District plans

"(a) (1) Prior to the expiration of the twelve calendar month period following the date of the enactment of the **Speedy Trial Act of 1973, each United States district court,** with the approval of the judicial council of the circuit, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the period that the one hundred and twenty day trial limitation required by section 3161(b)(1)(B) of this chapter is in effect. Prior to the expiration of the twenty-four calendar month period following such date of enactment, each such court, with the approval of such council, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) on and after the expiration of the thirty-six calendar month period following the date **of the enactment of the Speedy Trial Act of 1973.**

"(2) Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center, the United States attorney, and attorneys experienced in the defense of criminal cases in the district, including the Federal Public Defender, if any. Such plan shall include all such recommendations and shall further include a description of the procedural techniques, innovations, systems, and other methods by which the district court has expedited or intends to expedite the trial or other disposition of criminal cases. The plan shall make special provision for the speedy trial of cases at places of holding court where there is no judge continuously resident. The district court may modify such plan at any time with the approval of the judicial council of the circuit and shall modify the plan when directed by such council. The district court shall notify the Administrative Office of the United States Court of any modification of such plan.

"(b) (1) Prior to the expiration of the twelve calendar month period following the date of the enactment of the Speedy Trial Act of 1973, the chief judge for the Superior Court of the District of Columbia, with the approval of the Joint Committee on Judicial Administration in the District of Columbia, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter within the jurisdiction of the Superior Court during the period that the one hundred and twenty day trial limitation required by section 3161 (b) (1) (B) of this chapter is in effect. Prior to the expiration of the twenty-four calendar month period following such date of enactment, the chief judge of such court, with the approval of such Joint Committee, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offense under this chapter, within the jurisdiction of such court, on and after the expiration of the thirty-six calendar month period following the date of the enactment of the Speedy Trial Act of 1973.

"(2) Such plan shall be formulated after consultation with, and after considering the recommendations of, the Joint Committee, the Corporation Counsel, United States attorney, the Public Defender Service and attorneys experienced in the defense of criminal cases in the District of Columbia. Such plan shall include all such recommendations and shall further include a description of the procedural techniques, innovations, systems, and other methods by which the district court has expedited or intends to expedite the trial or other disposition of criminal cases. The chief judge may modify such plan at any time with the approval of the Joint Committee and shall modify the plan when directed by such Committee. The chief judge shall notify the Administrative Office of the United States Courts of any modification of such plan.

"(c) Within fifteen calendar months after the date of the enactment of the Speedy Trial Act of 1973, the Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit a report to the Congress detailing the plans submitted to it pursuant to the first sentence of section 3165 (a) (1) and 3165 (b) (1) of this chapter, including any legislative proposals and appropriations necessary to achieve compliance with the time limitations provided in section 3161. Within twenty-seven calendar months following such date of enactment, the Administrative Office of the United States Courts, with such approval, shall submit such a report to the Congress covering plans submitted to such Office pursuant to the second sentence of section 3165 (a) (1) and 3165 (b) (1) of this chapter.

"(d) For the purpose of carrying out the provisions of this section, there is hereby authorized to be appropriated such sums as Congress may find necessary.

"§ 3166. Definitions

"As used in this chapter—

"(1) the terms 'judge' or 'judicial officer' mean, unless otherwise indicated, any United States magistrate, Federal district judge, or judge of the Superior Court for the District of Columbia, and

"(2) the term 'offense' means any criminal offense, other than a petty offense (as defined in section 1(3) of this title) or an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of any Act of Congress and is triable by any court established by Act of Congress.

"§ 3167. Sixth amendment rights

"No provision of this title shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution".

93D CONGRESS
2D SESSION

S. 754

IN THE HOUSE OF REPRESENTATIVES

JULY 29, 1974

Referred to the Committee on the Judiciary

AN ACT

To give effect to the sixth amendment right to a speedy trial for persons charged with criminal offenses and to reduce the danger of recidivism by strengthening the supervision over persons released pending trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Speedy Trial Act of 1974".

TITLE I—SPEEDY TRIAL

SEC. 101. Title 18, United States Code, is amended by adding immediately after chapter 207 a new chapter 208, as follows:

I

"CHAPTER 208.—SPEEDY TRIAL

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. Interim limits.
"3165. Planning process.
"3166. District plans—generally.
"3167. District plans—contents.
"3168. Speedy trial reports.
"3169. Pilot districts.
"3170. Definitions.
"3171. Sixth amendment rights.

"§ 3161. Time limits and exclusions

"(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set a day certain for trial.

"(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

"(c) The trial of a defendant charged in an information or indictment with the commission of an offense shall be commenced within sixty days from the date on which the information or indictment containing such charge is filed (and made public).

"(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, for reasons other than those provided in section 3162(a) and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

"(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

"(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 (b) of this chapter the time limit imposed by subsection (b) of this section shall be sixty days, and for the second and third such twelve-month periods such time limit shall be forty-five days.

"(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 (c) of this chapter, the time limit imposed by subsection (c) of this section shall be one hundred and eighty days, and for the second and third such twelve-month periods such time limit shall be one hundred and twenty days.

"(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

"(i) delay resulting from any examination and hearing on competency;

"(ii) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

"(iii) delay resulting from trials with respect to other charges against the defendant;

"(iv) delay resulting from interlocutory appeals;

"(v) delay resulting from hearings on pretrial motions;

"(vi) delay resulting from proceedings under Rule 20 of the Federal Rules of Criminal Procedure; and

"(vii) delay reasonably attributable to any period during which any proceeding concerning the defendant is actually under advisement.

"(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

"(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

"(B) For purposes of subclause (A) of this clause, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subclause, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists being returned for trial.

"(4) Any period of delay resulting from the fact that the defendant is incompetent to stand trial.

"(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

"(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

"(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interest of the public and the defendant in a speedy trial.

"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice;

"(ii) whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section; or

"(iii) whether delay after the grand-jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

"(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea of guilty becomes final.

"§ 3162. Sanctions

"(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed as required by section 3161 (b) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. The dismissing or dropping of such charge shall not bar a subsequent prosecution.

"(2) If a defendant is not brought to trial as required by section 3161 (c), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h) (3). Such dismissal shall not bar a subsequent prosecution. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

"(b) After a dismissal pursuant to subsection (a) (1) or (a) (2) a prosecution can be reinstituted for the offense charged, any offense based on the same conduct or arising from the same criminal episode, and any other offense required to be joined with the offense. Such prosecution can only be reinstituted if the court in which the original action was pending finds that the attorney for the government has presented compelling evidence that the delay was caused by exceptional circumstances which the government and the court could not have foreseen or avoided. Exceptional circumstances shall not mean general congestion of the court's docket, lack of diligent preparation or failure to obtain available witnesses.

"(c) Notwithstanding the provisions of subsection (b) of this section, for the first and second twelve-calendar month periods following the effective date of this section as set forth in section 3163 (c) of this chapter, a prosecution can be reinstituted subsequent to dismissal made pursuant to section 3163 (a) without the requirement of a finding of exceptional circumstances.

"(d) In any case in which counsel for the defendant or the attorney for the government (1) knowingly allows a date certain for trial to be set without disclosing the fact that a necessary witness would be unavailable for trial on such date; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial on the date set for trial without justification consistent with section 3161 of this chapter, the court may punish any counsel or attorney, as the case may be, as follows:

"(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

"(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

"(C) by imposing on any attorney for the Government a fine of not to exceed $250;

"(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

"(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

"(e) The court shall follow Rule 42 of the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

"§ 3163. Effective dates

"(a) The time limitation in section 3161 (b) of this chapter—

"(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974; and

"(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

"(b) The time limitation in section 3161 (c) of this chapter—

"(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974; and

"(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

"(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following the enactment of the Speedy Trial Act of 1974.

"§ 3164. Interim limits

"(a) During an interim period commencing ninety days following the date of the enactment of the Speedy Trial Act of 1974 and ending on the date immediately preceding the date on which the time limits provided for under section 3161 (b) and section 3161 (c) of this chapter become effective, each district (and the Superior Court for the District of Columbia) shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

"(1) detained persons who are being held in detention solely because they are awaiting trial, and

"(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

"(b) During the period such plan is in effect, the trial of any person who falls within subparagraph (a) (1) or (a) (2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

"(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

"§ 3165. Planning process

"(a) Within sixty days of enactment of this Act, each United States district court and the Superior Court for the District of Columbia shall convene a planning group consisting at minimum of the Chief Judge, the United States Attorney, the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research and planning to act as reporter for the group. The group shall be responsible for the initial formulation of all district plans and of the reports required by the Act.

"(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of the Act and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

"(c) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

"(d) The planning group shall submit recommendations to the District Court for each of the District plans it must adopt pursuant to section 3166.

"§ 3166. District plans—generally

"(a) (1) Prior to the expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974, each United States district court, with the approval of the judicial council of the circuit, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the second and third twelve-calendar-month periods following the effective date of section 3161 (b) and section 3161 (c). Prior to the expiration of the thirty-six calendar month period following such date of enactment, each such court, with the approval of such council, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the fourth and fifth twelve-calendar-month periods following the effective date of section 3161 (b) and section 3161 (c). Prior to the expiration of the sixty-calendar-month period following such date of enactment, each such court, with the approval of such council, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the sixth twelve-calendar-month period following the effective date of section 3161 (b) and section 3161 (c).

"(2) Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the criminal justice planning group established for that district pursuant to section 3165. The district court may modify such plan at any time with the approval of the judicial council of the circuit and shall modify the plan when directed by such council. The district court shall notify the Administrative Office of the United States Courts of any modification of such plan.

"(b) (1) Prior to the expiration of the twelve-calendar-month period following the date of the enactment of the

Speedy Trial Act of 1974, the chief judge for the Superior Court of the District of Columbia, with the approval of the Joint Committee on Judicial Administration in the District of Columbia, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter within the jurisdiction of the Superior Court during the second and third twelve-calendar-month periods following the effective date of section 3161 (b) and section 3161 (c). Prior to the expiration of the thirty-six-calendar-month period following such date of enactment, the chief judge of such court, with the approval of such Joint Committee, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter, within the jurisdiction of such court, during the fourth and fifth twelve-calendar-month periods following the effective date of section 3161 (b) and section 3161 (c). Prior to the expiration of the sixty-calendar-month period following such date of enactment, the chief judge of such court, with the approval of such Joint Committee, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter, within the jurisdiction of such court, during the sixth twelve-calendar-month period following the effective date of section 3161(b) and section 3161(c).

"(2) Such plan shall be formulated after consultation with, and after considering the recommendations of, the Joint Committee and the criminal justice planning group established pursuant to section 3165. The chief judge may modify such plan at any time with the approval of the Joint Committee and shall modify the plan when directed by such Committee. The chief judge shall notify the Administrative Office of the United States Courts of any modification of such plan.

"(c) Within fifteen calendar months after the date of the enactment of the Speedy Trial Act of 1974, the Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit a report to the Congress detailing the plans submitted to it pursuant to the first sentence of section 3166(a) (1) and the first sentence of section 3166(b) (1) of this chapter, including any legislative proposals and appropriations necessary to achieve compliance with the time limitations provided in section 3161. Within thirty-nine calendar months following such date of enactment, the Administrative Office of the United States Courts, with such approval, shall submit such a report to the Congress covering plans submitted to such Office pursuant to the second sentence of section 3166(a) (1) and the first sentence of section 3166(b) (1) of this chapter. Within sixty-three calendar months following such date of enactment, the Administrative Office of the United States Courts, with such approval, shall submit such a report to the Congress covering plans submitted to such Office pursuant to the third sentence of section 3166(a) (1) and the third sentence of section 3166(b) (1) of this chapter.

"(d) District plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents. They shall be available (1) to the bar and the press in each district, (2) to the Department of Justice, (3) to the General Accounting Office, (4) to the Judiciary Committees and Appropriations Committees of the Senate and House of Representatives, and (5) at reasonable cost, to others who request them.

"(e) For the purpose of carrying out the provisions of this section and section 3165, there is hereby authorized to be appropriated such sums as Congress may find necessary.

"§ 3167. District plans—contents

"(a) Each District plan required by section 3166 shall include a description of the norms prevailing at the time of its submission as to characteristics of criminal justice administration in the district, including but not limited to: the time span between arrest and indictment, and indictment and trial;

the number of matters presented to the United States Attorney for prosecution; acceptance and rejection rates of prosecutions, and transfers to other districts and to State prosecution; the comparative number of cases disposed of by trial and by plea; the rates of conviction, dismissal, acquittal, nolle prosequi, diversion and other types of disposition; and the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

"(b) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States Attorney, the Federal Public Defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives set forth in section 3165(b) and section 3165(c).

"(c) Each plan shall prescribe reporting forms, procedures and time requirements, consistent with section 3168, for assembling information concerning (1) the incidence of and reasons for extensions of time beyond the statutory or district standards, (2) the invocation of sanctions for noncompliance with time standards, and (3) the incidence and length of, reasons for, and remedies for, detention prior to trial. These forms shall include the pretrial custody information required by Rule 46(g) of the Federal Rules of Criminal Procedure.

"(d) Each plan shall further specify the rule changes, statutory amendments and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

"§ 3168. Speedy trial reports

"(a) Reports shall be filed for purposes defined in this section by—

"(1) each prosecutor and defense attorney who seeks in an individual case an extension of time, or to avoid a sanction for noncompliance, in respect to a time limit prescribed in the Act or in a district plan,

"(2) each judge who grants or denies such a request in a case,

"(3) each planning group, district court, United States Attorney, and Federal Public Defender in a district, on an annual basis at the end of each twelve-calendar-month period beginning two years after the date of enactment, and

"(4) the Administrative Office of the United States Courts, the United States Department of Justice, and the General Accounting Office, on an annual basis beginning six months after the first reporting date referred to in subsection (a) (3) of this section. The reports referred to under (1) and (2) may consist of the memoranda and briefs of parties, and the written or transcribed opinions of judges, and shall be available to each organization designated in subsection (a) (3). A planning group or district court report referred to under subsection (a) (3) may be satisfied by a recommendation submitted for the same year under section 3165 or a plan submitted for the same year under section 3166 and shall be transmitted to the judicial council of the circuit and each organization designated in subsection (a) (4) of this section.

"(b) The contents of a report shall, to the extent applicable to a person or agency designated in subsection (a) (1), (2), and (3) of this section, include in individual cases or in cumulative profiles:

"(1) reasons for requesting or granting an extension of statutory limits, or for invoking or failing to invoke an applicable sanction,

"(2) the new timetable set, or requested to be set, for an extension, and the nature of the sanction, if any, invoked for noncompliance,

"(3) the effect on criminal justice administration of the prevailing time limits and sanctions, including effects on prosecution, defense, the judicial function, corrections, costs, transfers, appeals,

"(4) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classification, and

"(5) other information pertinent to the operation and implications of the district's plan.

"(c) District reports filed under subsection (a) (3) of this section shall be received, compiled and analyzed by the national agencies designated in subsection (a) (4) of this section for the purpose of distilling national summaries, and recommendations as to changes in rules, statutes, institutions, appropriations, reporting procedures, or other ingredients of the criminal process. All such reports shall be filed with the Judiciary and Appropriations Committees of the Senate and the House.

"§ 3169. Pilot districts

"(a) There are hereby authorized to be appropriated $5,000,000 to carry out the initial phases of planning and implementation of speedy trial plans under this Act in five pilot Federal judicial districts. The funds shall remain available until expended, and requests to renew the appropriation shall receive priority if endorsed by the planning groups in each of such districts, and their parent agencies.

"(b) The pilot districts shall be designated jointly by the Chief Justice and the Attorney General on the basis of applications received by them from planning groups established under section 3165. Each such application shall describe in detail the process by which the district proposes to carry out the provisions of this Act. To be eligible, applications shall be submitted on or before one hundred and eighty days from the date of enactment, and the designation of pilot districts, and the amount of funds awarded, shall be made public no later than two hundred and seventy days after enactment. All applications shall be public documents.

"(c) No funds appropriated under this section may be expended in any pilot district except by two-thirds vote of the planning group. Funds may be expended for personnel, facilities, and any other purpose permitted by law. Where an expenditure requires further action by Congress, as in the creation of an additional judgeship, such recommendation shall receive priority if endorsed by the national agencies designated in section 3166(d).

"§ 3170. Definitions

"As used in this chapter—

"(1) the terms 'judge' or 'judicial officer' mean, unless otherwise indicated, any United States magistrate, Federal district judge, or judge of the Superior Court for the District of Columbia, and

"(2) the term 'offense' means any criminal offense, other than a petty offense (as defined in section 1 (3) of this title) or an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of any Act of Congress and is triable by any court established by Act of Congress.

"§ 3171. Sixth amendment rights

"No provision of this title shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution".

Union Calendar No. 730

93D CONGRESS
2D SESSION

H. R. 17409

[Report No. 93–1508]

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 16, 1974

Mr. CONYERS (for himself, Mr. COHEN, Mr. SARBANES, Mr. FISH, Mr. RANGEL, Mr. MARAZITI, Mr. THORNTON, and Mr. OWENS) introduced the following bill; which was referred to the Committee on the Judiciary

NOVEMBER 27, 1974

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

A BILL

To assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Speedy Trial Act of 1974".

TITLE I—SPEEDY TRIAL

SEC. 101. Title 18, United States Code, is amended by adding immediately after chapter 207, a new chapter 208, as follows:

VI–O

"Chapter 208.—SPEEDY TRIAL

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. Interim limits.
~~"3165. Planning process.~~
~~"3166. District plans—generally.~~
~~"3167. District plans—contents.~~
~~"3168. Speedy trial reports.~~
~~"3169. Planning appropriations.~~
~~"3170. Definitions.~~
~~"3171. Sixth amendment rights.~~
~~"3172. Judicial emergency.~~
"3165. District plans—generally.
"3166. District plans—contents.
"3167. Reports to Congress.
"3168. Planning process.
"3169. Federal Judicial Center.
"3170. Speedy trial data.
"3171. Planning appropriations.
"3172. Definitions.
"3173. Sixth amendment rights.
"3174. Judicial emergency.

"§ 3161. Time limits and exclusions.

"(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

"(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty ~~days, but in no such case shall an individual awaiting indictment be detained in excess of thirty days from the date of arrest.~~ *days.*

"*(c)* The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, ~~a defendant shall be tried~~ *the trial of the defendant shall commence* within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

"(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, for reasons other than those provided in section 3162(a), and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

"(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

"(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163~~(b)~~*(a)* of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

"(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163 ~~(c)~~ *(b)* of this chapter, the time limit with respect to the period between ~~indictment~~ *arraignment* and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between ~~indictment~~ *arraignment* and trial shall be eighty days.

"(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

"(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

"(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

"(C) delay resulting from trials with respect to other charges against the defendant;

"(D) delay resulting from interlocutory appeals;

"(E) delay resulting from hearings on pretrial motions;

"(F) delay resulting from proceedings ~~under Rule 20 of~~ *relating to transfer from other districts under* the Federal Rules of Criminal Procedure; and

"(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

"(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

"(3) (A) Any period of delay resulting from the absence of unavailability of the defendant or an essential witness.

"(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendent or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

"(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

"(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

"(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

"(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

"(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

"(C) No ~~such~~ continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar~~,~~ *or* lack of diligent preparation~~,~~ or failure to obtain available witnesses~~.~~ *on the part of the attorney for the Government.*

"(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

"(j) (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

"(A) undertake to obtain the presence of the prisoner for trial; or

"(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

"(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

"(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

"(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

"§ 3162. Sanctions.

"(a) (1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed as required by section 3161 (b) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. *Dismissal with prejudice shall only apply to those offenses which were known or reasonably should have been known at the time of dismissal.* The dismissing or dropping of such charge shall forever bar prosecution of the individual for that offense or any offense based on the same conduct ~~or arising from the same criminal episode~~.

"(2) If a defendant is not brought to trial as required by section 3161 (c), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161 (h) (3). Such dismissal shall forever bar prosecution of the individual for that offense or any offense based on the same conduct ~~or arising from the same criminal episode~~. *Dismissal with prejudice shall only apply to* *those offenses which were known or reasonably should have been known at the time of dismissal.* Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

"(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

"(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

"(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

"(C) by imposing on any attorney for the Government a fine of not to exceed $250;

"(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

"(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

"(c) The court shall follow ~~Rule 42 of~~ *procedures established in* the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

"§ 3163. Effective dates.

"(a) The time limitation in section 3161(b) of this chapter—

"(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974; and

"(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration.

"(b) The time limitation in section 3161(c) of this chapter—

"(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974; and

"(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

"(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following the enactment of the Speedy Trial Act of 1974.

"§ 3164. Interim limits.

"(a) During an interim period commencing ninety days following the date of the enactment of the Speedy Trial Act of 1974 and ending on the date immediately preceding the date on which the time limits provided for under section 3161 (b) and section 3161 (c) of this chapter become effective, each district ~~(and the Superior Court for the District of Columbia)~~ shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving—

"(1) detained persons who are being held in detention solely because they are awaiting trial, and

"(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

"(b) During the period such plan is in effect, the trial of any person who falls within subsection (a) (1) or (a) (2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

"(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

~~“§ 3165. Planning process.~~

~~“(a) Within sixty days of enactment of this Act, each United States district court and the Superior Court for the District of Columbia shall convene a planning group consisting at minimum of the Chief Judge, a United States Magistrate, if any, designated by the Chief Judge, the clerk of the district court, the United States Attorney, the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research and planning to act as reporter for the group. The group shall be responsible for the initial formulation of all district plans and of the reports required by the Act and in aid thereof, it shall be entitled to the planning funds specified in section 3169.~~

~~“(b) The planning and implementation process shall~~

~~seek to accelerate the disposition of criminal cases in the district consistent with the time standards of the Act and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.~~

"~~(c) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.~~

"~~(d) The planning group shall submit recommendations to the district court for each of the district plans it must adopt pursuant to section 3166.~~

"~~**§ 3166. District plans—generally.**~~

"~~(a)(1) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being re-~~

~~viewed or such other active judge of that court as the chief judge of that district court may designate.~~

~~“(2) Prior to the expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974, each United States district court, with the approval of the reviewing panel, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the second and third twelve-calendar-month periods following the effective date of section 3161(b) and section 3161(c). Prior to the expiration of the thirty-six-calendar-month period following such date of enactment, each such court, with the approval of such panel, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter (within the jurisdiction of such court) during the fourth twelve-calendar-month period following the effective date of section 3161(b) and section 3161(c).~~

~~“(3) Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the criminal justice planning group established for that district pursuant to section 3165. The district court may modify such plan at any time with the approval of the reviewing panel and shall modify~~

~~the plan when directed by such panel or by the Judicial Conference of the United States. The district court shall notify the Administrative Office of the United States Courts of any modification of such plan.~~

~~"(b)(1) Prior to the expiration of the twelve-calendar-month period following the date of the enactment of the Speedy Trial Act of 1974, the chief judge for the Superior Court of the District of Columbia, with the approval of the Joint Committee on Judicial Administration in the District of Columbia, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter within the jurisdiction of the Superior Court during the second and third twelve-calendar-month periods following the effective date of section 3161(b) and section 3161(c). Prior to the expiration of the thirty-six-calendar-month period following such date of enactment, the chief judge of such court, with the approval of such Joint Committee, shall prepare and submit to the Administrative Office of the United States Courts a plan for the trial or other disposition of offenses under this chapter within the jurisdiction of such court, during the fourth twelve-calendar-month period following the effective date of section 3161(b) and section 3161(c).~~

~~"(2) Such plan shall be formulated after consultation with, and after considering the recommendations of, the Joint~~

~~Committee and the criminal justice planning group established pursuant to section 3165. The chief judge may modify such plan at any time with the approval of the Joint Committee and shall modify the plan when directed by such Committee. The chief judge shall notify the Administrative Office of the United States Courts of any modification of such plan.~~

~~“(c) Within fifteen calendar months after the date of the enactment of the Speedy Trial Act of 1974, the Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit a report to the Congress detailing the plans submitted to it pursuant to the first sentence of subsection (a)(2) and the first sentence of subsection (b)(1) of this section, including any legislative proposals and appropriations necessary to achieve compliance with the time limitations provided in section 3161. Within thirty-nine calendar months following such date of enactment, the Administrative Office of the United States Courts, with such approval, shall submit such a report to the Congress covering plans submitted to such Office pursuant to the second sentence of subsection (a)(1) and the first sentence of subsection (b)(1) of this section.~~

~~“(d) District plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public docu-~~

~~ments. They shall be available (1) to the bar and the press in each district, (2) to the Department of Justice, (3) to the General Accounting Office, (4) to the Judiciary Committees and Appropriations Committees of the Senate and House of Representatives, and (5) at reasonable cost, to others who request them.~~

~~"(c) The Federal Judicial Center shall advise and consult with the criminal justice advisory planning groups and the district court in connection with their duties under this chapter.~~

~~"§ 3167. District plans—contents.~~

~~"(a) Each District plan required by section 3166 shall include a description of the norms prevailing at the time of its submission as to characteristics of criminal justice administration in the district, including but not limited to: the time span between arrest and indictment, and indictment and trial; the number of matters presented to the United States attorney for prosecution; acceptance and rejection rates of prosecutions, and transfers to other districts and to State prosecution; the comparative number of cases disposed of by trial and by plea; the rates of conviction, dismissal, acquittal, nolle prosequi, diversion and other types of disposition; and the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.~~

~~“(b) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives set forth in section 3165(b) and section 3165(c).~~

~~“(c) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements, consistent with section 3168, for assembling information concerning (1) the incidence of and reasons for extensions of time beyond the statutory or district standards, (2) the invocation of sanctions for noncompliance with time standards, and (3) the incidence and length of, reasons for, and remedies for, detention prior to trial. These forms shall include the pretrial custody information required by rule 46(g) of the Federal Rules of Criminal Procedure. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3168 after consideration of the recommendations contained in the district plan~~

~~and the need to reflect both unique local conditions and uniform national reporting standards.~~

~~"(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.~~

~~**"§ 3168. Speedy trial reports.**~~

~~"(a) Reports shall be filed for purposes defined in this section by—~~

~~"(1) each prosecutor and defense attorney who seeks in an individual case an extension of time, or to avoid a sanction for noncompliance, in respect to a time limit prescribed in this chapter or in a district plan,~~

~~"(2) each judge who grants or denies such a request in a case,~~

~~"(3) each planning group, district court, United States attorney, and Federal public defender in a district, on an annual basis at the end of each twelve calendar-month period beginning two years after the date of enactment, and~~

~~"(4) the Administrative Office of the United States Courts, the United States Department of Justice, and the General Accounting Office, on an annual basis beginning six months after the first reporting date referred to~~

~~in subsection (a)(3) of this section.~~

~~The reports referred to under (1) and (2) shall be filed with the clerk of each district court and may consist of the memorandums and briefs of parties, and the written or transcribed opinions of judges. The clerk shall make such reports available to each organization designated in subsection (a)(3). A planning group or district court report referred to under subsection (a)(3) may be satisfied by a recommendation submitted for the same year under section 3165 or a plan submitted for the same year under section 3166 and shall be transmitted to the judicial council of the circuit and each organization designated in subsection (a)(4) of this section.~~

~~“(b) The contents of a report shall, to the extent applicable to a person or agency designated in subsections (a)(1), (2), and (3) of this section, include in individual cases or in cumulative profiles—~~

~~“(1) reasons for requesting or granting an extension of statutory limits, or for invoking or failing to invoke an applicable sanction;~~

~~“(2) the new timetable set, or requested to be set, for an extension, and the nature of the sanction, if any, invoked for noncompliance;~~

~~“(3) the effect on criminal justice administration of the prevailing time limits and sanctions, including~~

~~effects on prosecution, defense, the judicial function, corrections, costs, transfers, appeals,~~

~~"(4) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classification, and~~

~~"(5) other information pertinent to the operation and implications of the district's plan.~~

~~"(c) Reports filed pursuant to subsection (a)(1) and (a)(2) of this section shall be made to the planning group. District reports filed under subsection (a)(3) of this section shall be received, compiled, and analyzed by the national agencies designated in subsection (a)(4) of this section for the purpose of distilling national summaries, and recommendations as to changes in rules, statutes, institutions, appropriations, reporting procedures, or other ingredients of the criminal process. All such reports shall be filed with the Judiciary and Appropriations Committee of the Senate and the House.~~

~~"(d) In the case of each indictment with respect to which there has been a thirty-day extension under section 3161(b) of this chapter, the attorney for the Government shall, not later than five days after the filing of such indictment, report the fact of such extension together with the reasons for not being able to hold a session of a grand jury~~

~~during the period before that extension, to the appropriate district court and the appropriate planning group.~~

~~"§ 3169. Planning appropriations.~~

~~"(a) There is hereby authorized to be appropriated to the Federal judiciary $2,500,000 of which sum $25,000 shall be allocated by the Administrative Office of the United States Courts to each Federal judicial district, and to the Superior Court of the District of Columbia, to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds shall remain available until expended.~~

~~"(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.~~

~~"§ 3170. Definitions.~~

~~"As used in this chapter—~~

~~"(1) the term 'judge' or 'judicial officer' means, unless otherwise indicated, any United States magistrate, Federal district judge, or judge of the Superior Court of the District of Columbia, and~~

~~"(2) the term 'offense' means any criminal offense, other than a petty offense (as defined in section 1(3) of this title) or an offense triable by court-martial, mil-~~

~~itary commission, provost court, or other military tribunal, which is in violation of any Act of Congress and is triable by any court established by Act of Congress.~~

~~"§ 3171. Sixth amendment rights.~~

~~"No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.~~

~~"§ 3172. Judicial emergency.~~

~~"(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the Chief Judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits. The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.~~

~~"(b) If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may apply to the Judicial Conference of the United States for a suspension of time limits set forth in section 3161(c). The Judicial Conference, if it finds that such calendar congestion cannot be reasonably alleviated, may~~

~~grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.~~

"~~(c) Any suspension of time limits granted by the Judicial Conference shall be reported to the Congress within ten days of approval by the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth detailed reasons for granting such approval and a proposal for increasing the resources of such district. In the event an additional period of suspension of time limits is necessary, the Director of the Administrative Office of the United States Courts shall so indicate in his report to the Congress, which report shall contain such application for such additional period of suspension together with any other pertinent information. The Judicial Conference shall not grant a suspension to any district within six months follow-~~

~~ing the expiration of a prior suspension without the consent of the Congress. Such consent may be requested by the Judicial Conference by reporting to the Congress the facts supporting the need for a suspension within such six-month period. Should the Congress fail to act on any application for a suspension of time limits within six months, the Judicial Conference may grant such a suspension for an additional period not to exceed one year."~~

"§ *3165. District plans—generally.*

"(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the disposition of criminal cases in accordance with this Act. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the criminal justice advisory planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

"(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of the Act and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased

knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

"(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

"(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

"(e)(1) Prior to the expiration of the twelve calendar month period following the date of the enactment of this Act, each United States district court shall prepare and submit a

plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161(b) and subsection 3161(c).

"(2) Prior to the expiration of the thirty-six calendar month period following the date of enactment of this Act, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth twelve-calendar month period following the effective date of subsection 3161 (b) and subsection 3161(c).

"§ 3166. District plans—contents.

"(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering information and statistics, by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts, consistent with the time limits and other objectives of this Act.

"(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this Act, including:

"(1) the incidence of, and reasons for, request or

allowance of extensions of time beyond statutory or district standards;

"(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

"(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

"(4) the new timetable set, or requested to be set, for an extension;

"(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

"(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by rule 46(g) of the Federal Rules of Criminal Procedure; and

"(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications.

"(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

"(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

"(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

"(3) the number of matters transferred to other districts or to States for prosecution;

"(4) the number of cases disposed of by trial and by plea;

"(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

"(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

"(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

"(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time require-

ments consistent with section 3168 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

"§ *3167. Reports to Congress.*

"(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

"(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this Act. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts.

"§ *3168. Planning process.*

"(a) Within sixty days of enactment of this Act, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States

magistrate, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district court, the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by the Act and in aid thereof, it shall be entitled to the planning funds specified in section 3169.

"(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

"(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the

provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

"§ 3169. Federal Judicial Center.

"The Federal Judicial Center shall advise and consult with the criminal justice advisory planning groups and the district courts in connection with their duties under this Act.

"§ 3170. Speedy trial data.

"(a) To facilitate the planning process and the implementation of the time limits and objectives of this Act, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166 (b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

"(b) The clerk of each district court is authorized to obtain the information required by sections 3166 (b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States dis-

trict court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

"(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the criminal justice advisory planning group, the circuit council, and the Administrative Office of the United States Courts.

"§ 3171. Planning appropriations.

"(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 of which sum up to $25,000 shall be allocated by the Administrative Office of the United States Courts to each Federal judicial district, and to the Superior Court of the District of Columbia, to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

"(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

"§ 3172. Definitions.

"As used in this chapter—

"(1) the terms 'judge' or 'judicial officer' mean, unless otherwise indicated, any United States magistrate, Federal district judge, or judge of the Superior Court for the District of Columbia, and

"(2) the term 'offense' means any criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

"§ *3173. Sixth amendment rights.*

"No provision of this title shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

"§ *3174. Judicial emergency.*

"(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits. The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any

recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

"(b) If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may apply to the Judicial Conference of the United States for a suspension of time limits set forth in section 3161 (c). The Judicial Conference, if it finds that such calendar congestion cannot be reasonably alleviated, may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

"(c) Any suspension of time limits granted by the Judicial Conference shall be reported to the Congress within ten days of approval by the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth de-

tailed reasons for granting such approval and a proposal for increasing the resources of such district. In the event an additional period of suspension of time limits is necessary, the Director of the Administrative Office of the United States Courts shall so indicate in his report to the Congress, which report shall contain such application for such additional period of suspension together with any other pertinent information. The Judicial Conference shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress. Such consent may be requested by the Judicial Conference by reporting to the Congress the facts supporting the need for a suspension within such six-month period. Should the Congress fail to act on any application for a suspension of time limits within six months, the Judicial Conference may grant such a suspension for an additional period not to exceed one year."

SEC. 102. The tables of chapters for title 18 of the United States Code and for part II of title 18 of the United States Code are each amended by inserting immediately after the item relating to chapter 207 the following new item:

"208. Speedy trial .... 3161".

Public Law 93-619
93rd Congress, S. 754
January 3, 1975

An Act

To assist in reducing crime and the danger of recidivism by requiring speedy trials and by strengthening the supervision over persons released pending trial, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Speedy Trial Act of 1974".

Speedy Trial Act of 1974.
18 USC 3161 note.

TITLE I—SPEEDY TRIAL

Sec. 101. Title 18, United States Code, is amended by adding immediately after chapter 207, a new chapter 208, as follows:

"Chapter 208.—SPEEDY TRIAL

"Sec.
"3161. Time limits and exclusions.
"3162. Sanctions.
"3163. Effective dates.
"3164. Interim limits.
"3165. District plans—generally.
"3166. District plans—contents.
"3167. Reports to Congress.
"3168. Planning process.
"3169. Federal Judicial Center.
"3170. Speedy trial data.
"3171. Planning appropriations.
"3172. Definitions.
"3173. Sixth amendment rights.
"3174. Judicial emergency.

"§ 3161. Time limits and exclusions.

18 USC 3161.

"(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

88 STAT. 2076
88 STAT. 2077

"(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

"(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

"(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

"(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

Post, p. 2080.

"(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

"(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

Delay periods.

"(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

88 STAT. 2077

88 STAT. 2078

"(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

"(A) delay resulting from an examination of the defendant, and hearing on, his mental competency, or physical incapacity;

"(B) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;

"(C) delay resulting from trials with respect to other charges against the defendant;

"(D) delay resulting from interlocutory appeals;

"(E) delay resulting from hearings on pretrial motions;

"(F) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

"(G) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

"(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

"(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

"(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

"(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

"(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.

"(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

"(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

"(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

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"(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

"(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

"(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.

"(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

"(C) No continuance under paragraph (8)(A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

"(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

"(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly—

"(A) undertake to obtain the presence of the prisoner for trial; or

"(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

"(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

"(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

"(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

18 USC 3162.

"§ 3162. Sanctions.

"(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

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"(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Waiver.

"(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

"(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof; 18 USC 3006A.

"(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

"(C) by imposing on any attorney for the Government a fine of not to exceed $250;

"(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

"(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

"(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section. 18 USC app.

"§ 3163. Effective dates. 18 USC 3163.

"(a) The time limitation in section 3161(b) of this chapter—

"(1) shall apply to all individuals who are arrested or served with a summons on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

"(2) shall commence to run on such date of expiration to all individuals who are arrested or served with a summons prior to the date of expiration of such twelve-calendar-month period, in connection with the commission of an offense, and with respect to which offense no information or indictment has been filed prior to such date of expiration. 88 STAT. 2080

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"(b) The time limitation in section 3161(c) of this chapter—

"(1) shall apply to all offenses charged in informations or indictments filed on or after the date of expiration of the twelve-calendar-month period following July 1, 1975; and

"(2) shall commence to run on such date of expiration as to all offenses charged in informations or indictments filed prior to that date.

"(c) Section 3162 of this chapter shall become effective after the date of expiration of the fourth twelve-calendar-month period following July 1, 1975.

"§ 3164. Interim limits. 18 USC 3164.

"(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limits provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving— Interim plan.

"(1) detained persons who are being held in detention solely because they are awaiting trial, and

"(2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.

"(b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.

"(c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required.

18 USC 3165.

"§ 3165. District plans—generally.

Administration of criminal justice, continuing study.

"(a) Each district court shall conduct a continuing study of the administration of criminal justice in the district court and before United States magistrates of the district and shall prepare plans for the disposition of criminal cases in accordance with this chapter. Each such plan shall be formulated after consultation with, and after considering the recommendations of, the Federal Judicial Center and the planning group established for that district pursuant to section 3168. The plans shall be prepared in accordance with the schedule set forth in subsection (e) of this section.

"(b) The planning and implementation process shall seek to accelerate the disposition of criminal cases in the district consistent with the time standards of this chapter and the objectives of effective law enforcement, fairness to accused persons, efficient judicial administration, and increased knowledge concerning the proper functioning of the criminal law. The process shall seek to avoid underenforcement, overenforcement and discriminatory enforcement of the law, prejudice

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to the prompt disposition of civil litigation, and undue pressure as well as undue delay in the trial of criminal cases.

Submission to review panel.

"(c) The plans prepared by each district court shall be submitted for approval to a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district court whose plan is being reviewed or such other active judge of that court as the chief judge of that district court may designate. If approved by the reviewing panel, the plan shall be forwarded to the Administrative Office of the United States Courts, which office shall report annually on the operation of such plans to the Judicial Conference of the United States.

Annual report to Judicial Conference.

Modifications.

"(d) The district court may modify the plan at any time with the approval of the reviewing panel. It shall modify the plan when directed to do so by the reviewing panel or the Judicial Conference of the United States. Modifications shall be reported to the Administrative Office of the United States Courts.

"(e)(1) Prior to the expiration of the twelve-calendar-month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the second and third twelve-calendar-month periods following the effective date of subsection 3161 (b) and subsection 3161(c).

"(2) Prior to the expiration of the thirty-six calendar month period following July 1, 1975, each United States district court shall prepare and submit a plan in accordance with subsections (a) through (d) above to govern the trial or other disposition of offenses within the jurisdiction of such court during the fourth and subsequent twelve-calendar month periods following the effective date of subsection 3161 (b) and subsection 3161(c).

"(f) Plans adopted pursuant to this section shall, upon adoption, and recommendations of the district planning group shall, upon completion, become public documents.

"§ 3166. District plans—contents.

18 USC 3166.

"(a) Each plan shall include a description of the time limits, procedural techniques, innovations, systems and other methods, including the development of reliable methods for gathering and monitoring information and statistics, by which the district court, the United States attorney, the Federal public defender, if any, and private attorneys experienced in the defense of criminal cases, have expedited or intend to expedite the trial or other disposition of criminal cases, consistent with the time limits and other objectives of this chapter.

"(b) Each plan shall include information concerning the implementation of the time limits and other objectives of this chapter, including:

"(1) the incidence of and reasons for, requests or allowances of extensions of time beyond statutory or district standards;

"(2) the incidence of, and reasons for, periods of delay under section 3161(h) of this title;

"(3) the incidence of, and reasons for, the invocation of sanctions for noncompliance with time standards, or the failure to invoke such sanctions, and the nature of the sanction, if any invoked for noncompliance;

"(4) the new timetable set, or requested to be set, for an extension;

"(5) the effect on criminal justice administration of the prevailing time limits and sanctions, including the effects on the prosecution, the defense, the courts, the correctional process, costs, transfers and appeals;

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"(6) the incidence and length of, reasons for, and remedies for detention prior to trial, and information required by the provisions of the Federal Rules of Criminal Procedure relating to the supervision of detention pending trial;

18 USC app.

"(7) the identity of cases which, because of their special characteristics, deserve separate or different time limits as a matter of statutory classifications; and

"(8) the incidence of, and reasons for each thirty-day extention under section 3161(b) with respect to an indictment in that district.

"(c) Each district plan required by section 3165 shall include information and statistics concerning the administration of criminal justice within the district, including, but not limited to:

"(1) the time span between arrest and indictment, indictment and trial, and conviction and sentencing;

"(2) the number of matters presented to the United States Attorney for prosecution, and the numbers of such matters prosecuted and not prosecuted;

"(3) the number of matters transferred to other districts or to States for prosecution;

"(4) the number of cases disposed of by trial and by plea;

"(5) the rates of nolle prosequi, dismissal, acquittal, conviction, diversion, or other disposition; and

"(6) the extent of preadjudication detention and release, by numbers of defendants and days in custody or at liberty prior to disposition.

"(d) Each plan shall further specify the rule changes, statutory amendments, and appropriations needed to effectuate further improvements in the administration of justice in the district which cannot be accomplished without such amendments or funds.

Recommendations to the Administrative Office of the United States Courts.

"(e) Each plan shall include recommendations to the Administrative Office of the United States Courts for reporting forms, procedures, and time requirements. The Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, shall prescribe such forms and procedures and time requirements consistent with section 3170 after consideration of the recommendations contained in the district plan and the need to reflect both unique local conditions and uniform national reporting standards.

18 USC 3167.

"§ 3167. Reports to Congress.

"(a) The Administrative Office of the United States Courts, with the approval of the Judicial Conference, shall submit periodic reports to Congress detailing the plans submitted pursuant to section 3165. The reports shall be submitted within three months following the final dates for the submission of plans under section 3165(e) of this title.

Contents.

"(b) Such reports shall include recommendations for legislative changes or additional appropriations to achieve the time limits and objectives of this chapter. The report shall also contain pertinent information such as the state of the criminal docket at the time of the adoption of the plan; the extent of pretrial detention and release; and a description of the time limits, procedural techniques, innovations, systems, and other methods by which the trial or other disposition of criminal cases have been expedited or may be expedited in the districts.

18 USC 3168.

"§ 3168. Planning process.

Planning group.

"(a) Within sixty days after July 1, 1975, each United States district court shall convene a planning group consisting at minimum of the Chief Judge, a United States magistrate, if any designated by the Chief Judge, the United States Attorney, the Clerk of the district

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court, the Federal Public Defender, if any, a private attorney experienced in the defense of criminal cases in the district, the Chief United States Probation Officer for the district, and a person skilled in criminal justice research who shall act as reporter for the group. The group shall advise the district court with respect to the formulation of all district plans and shall submit its recommendations to the district court for each of the district plans required by section 3165. The group shall be responsible for the initial formulation of all district plans and of the reports required by this chapter and in aid thereof, it shall be entitled to the planning funds specified in section 3171.

"(b) The planning group shall address itself to the need for reforms in the criminal justice system, including but not limited to changes in the grand jury system, the finality of criminal judgments, habeas corpus and collateral attacks, pretrial diversion, pretrial detention, excessive reach of Federal criminal law, simplification and improvement of pretrial and sentencing procedures, and appellate delay.

Travel expenses.

"(c) Members of the planning group with the exception of the reporter shall receive no additional compensation for their services, but shall be reimbursed for travel, subsistence and other necessary expenses incurred by them in carrying out the duties of the advisory group in accordance with the provisions of title 5, United States Code, chapter 57. The reporter shall be compensated in accordance with section 3109 of title 5, United States Code, and notwithstanding other provisions of law he may be employed for any period of time during which his services are needed.

Compensation.

"§ 3169. Federal Judicial Center.

18 USC 3169.

"The Federal Judicial Center shall advise and consult with the planning groups and the district courts in connection with their duties under this chapter.

"§ 3170. Speedy trial data.

18 USC 3170.

"(a) To facilitate the planning process and the implementation of the time limits and objectives of this chapter, the clerk of each district court shall assemble the information and compile the statistics required by sections 3166 (b) and (c) of this title. The clerk of each district court shall assemble such information and compile such statistics on such forms and under such regulations as the Administrative Office of the United States Courts shall prescribe with the approval of the Judicial Conference and after consultation with the Attorney General.

"(b) The clerk of each district court is authorized to obtain the information required by sections 3166 (b) and (c) from all relevant sources including the United States Attorney, Federal Public Defender, private defense counsel appearing in criminal cases in the district, United States district court judges, and the chief Federal Probation Officer for the district. This subsection shall not be construed to require the release of any confidential or privileged information.

"(c) The information and statistics compiled by the clerk pursuant to this section shall be made available to the district court, the planning group, the circuit council, and the Administrative Office of the United States Courts.

"§ 3171. Planning appropriations.

18 USC 3171.

"(a) There is authorized to be appropriated for the fiscal year ending June 30, 1975, to the Federal judiciary the sum of $2,500,000 to be allocated by the Administrative Office of the United States Courts to Federal judicial districts to carry out the initial phases of planning and implementation of speedy trial plans under this chapter. The funds so appropriated shall remain available until expended.

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"(b) No funds appropriated under this section may be expended in any district except by two-thirds vote of the planning group. Funds to the extent available may be expended for personnel, facilities, and any other purpose permitted by law.

"§ 3172. Definitions.

18 USC 3172.

"As used in this chapter—

"(1) the terms 'judge' or 'judicial officer' mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

"(2) the term 'offense' means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by

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court-martial, military commission, provost court, or other military tribunal).

18 USC 3173.

"§ 3173. Sixth amendment rights.

"No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.

USC prec. title 1.
18 USC 3174.
Time limits, suspension.

"§ 3174. Judicial emergency.

"(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits. The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

"(b) If the judicial council of the circuit shall find that no remedy for such congestion is reasonably available, such council may apply to the Judicial Conference of the United States for a suspension of time limits set forth in section 3161(c). The Judicial Conference, if it finds that such calendar congestion cannot be reasonably alleviated, may grant a suspension of the time limits in section 3161(c) for a period of time not to exceed one year for the trial of cases for which indictments are filed during such period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b), shall not be reduced, nor shall the sanctions set forth in section 3162 be suspended; but such time limits from arrangement to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

Reports to Congress.

"(c) Any suspension of time limits granted by the Judicial Conference shall be reported to the Congress within ten days of approval by the Director of the Administrative Office of the United States Courts, together with a copy of the application for such suspension, a written report setting forth detailed reasons for granting such approval and a proposal for increasing the resources of such district. In the event an additional period of suspension of time limits is necessary, the Director of the Administrative Office of the United States Courts shall so indicate in his report to the Congress, which report shall contain such application for such additional period of suspension together with any other pertinent information. The Judicial Conference shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress. Such consent may be requested by the Judicial Conference by reporting to the Congress the facts supporting the need for a suspension within such six-month period. Should the Congress fail to act on any application for a suspension of time limits within six months, the Judicial Conference may grant such a suspension for an additional period not to exceed one year."

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SEC. 102. The tables of chapters for title 18 of the United States Code and for part II of title 18 of the United States Code are each amended by inserting immediately after the item relating to chapter 207 the following new item:

"208. Speedy trial .... 3161".

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THE FEDERAL JUDICIAL CENTER

The Federal Judicial Center is the research, development, and training arm of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620-629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States is chairman of the Center's Board, which also includes the Director of the Administrative Office of the United States Courts and six judges elected by the Judicial Conference.

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